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No. (1)

In The
Supreme Court of the United States

THOMAS LEE MORRIS and
ELIZABETH S. MORRIS,

Petitioners,

vs.

TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JON METROPOULOS
(*Counsel of Record*)

GOUGH, SHANAHAN, JOHNSON & WATERMAN
33 S. Last Chance Gulch
P.O. Box 1715
Helena, MT 59624-1715
Phone: (406) 442-8560
Fax: (406) 442-8783

Attorney for Petitioners

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a federal statute, 25 U.S.C. §1301(2), violates the fundamental constitutional right of American Indians, who are citizens of the United States, to equal protection under the law guaranteed by the Fifth Amendment of the Constitution by subjecting nonmember Indians, but no other similarly situated nonmembers of a different race, to criminal prosecution and punishment by Indian tribes, the judicial proceedings of which are not constrained by the Constitution?

2. Whether the same federal statute violates the fundamental right of citizens of the United States to due process of law guaranteed by the Fifth Amendment of the Constitution by subjecting them to criminal prosecution and punishment by extraconstitutional sovereigns. Indian tribes, within the borders of the United States but unconstrained by the Constitution, which sovereigns, because of their racially and ethnically exclusive nature, deny them the right of full and equal participation in their political life?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners, Thomas L. Morris and Elizabeth S. Morris, and the Respondent, Judge Tanner, of the Tribal Court of the Confederated Salish and Kootenai Tribes, the United States intervened in this matter as a Defendant on March 14, 2002.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas Lee Morris and Elizabeth S. Morris hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but found at *Morris v. Tanner*, 160 Fed. Appx. 600 (9th Cir. 2005) (unpublished). It is reproduced in the Appendix at App. 1-3. The opinion of the District Court is reported as *Morris v. Tanner*, 288 F.Supp. 2d 1133 (D. Mont. 2003). It is reproduced in the Appendix at App. 28-29.

The opinion of the Court of Appeals in *Means v. Navajo Nation*, also relevant to this case, is reported as *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005). It is reproduced in the Appendix at App. 57.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered December 22, 2005. A timely petition for rehearing and rehearing *en banc* was denied on December 22, 2005. This Court, in an order dated March 13, 2006, allowed Petitioner Morris up to and including April 6, 2006, in which to file this Petition for Writ of Certiorari. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment*: The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . " U.S. Const. amend. V.

B. *25 U.S.C. § 1301*: For purposes of this title [25 U.S.C. §§ 1301, et seq.], the term –

> 1) "Indian Tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> 2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
>
> 3) "Indian court" means any Indian tribal court or court of Indian offense; and
>
> 4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an

offense listed in that section in Indian country to which that section applies.

25 U.S.C. § 1301.[1]

STATEMENT OF THE CASE

The federal district court for the district of Montana had jurisdiction over this matter under 28 U.S.C. § 1331. The Ninth Circuit Court of Appeals had jurisdiction to review that decision under 28 U.S.C. § 1292. The Ninth Circuit's decision in this case was dictated by its decision in *Means v. Navajo Nation*, 432 F.3d 924 (2005), App. 57-79, in which it provided its substantive constitutional analysis.[2] The Ninth Circuit denied Mr. Means' petition for rehearing and rehearing *en banc* on March 22, 2006. In both *Means* and *Morris*, the plaintiffs presented challenges to the 1990 Amendments based on their Fifth Amendment equal protection and due process rights. *Means*, 432 F.3d at 929, *Morris*, 160 Fed. Appx. at 600.

In *United States v. Lara*, 541 U.S. 193 (2004) (Breyer, J. writing for the majority; Stevens, J. concurring in the opinion; Kennedy, J. and Thomas, J. concurring, separately, in the judgment; Souter, J. dissenting), the Court

[1] The act of Congress specifically at issue is the amendment of 25 U.S.C. § 1301 embodied in the Act of November 5, 1990, §§ 8077(b)-(d), 104 Stat. 1892-1893 (temporary legislation until September 30, 1991), as made permanent by the Act of October 28, 1991, 105 Stat. 646, which added the recognition and affirmation of a tribe's inherent power to prosecute "all Indians," in subsection (2), and added subsection (4). They are referred to herein as the 1990 Amendments.

[2] Consequently, the citations to the lower court's opinion in this Petition reference the Circuit's *Means* decision.

reserved from decision these two challenges to the 1990 Amendments. In *Lara*, the Court held they are not a delegation of federal power but a Congressional revival by recognition of tribal inherent sovereign power that overruled this Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Court had held tribes lack jurisdiction to prosecute non-member Indians, just as it had previously held tribes lack the authority to prosecute non-member non-Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). The 1990 revival of this inherent tribal power, the Court held in *Lara*, meant that the Fifth Amendment double jeopardy proscription did not prevent a subsequent federal prosecution.

The particular questions reserved in *Lara* were: (1) whether a Congressional statute "recogniz[ing] and affirm[ing]" the "inherent" authority of a tribe to bring a criminal prosecution against Indians who are not members of that tribe but no non-Indian person violates the fundamental right of equal protection; and (2) whether this statute violates the fundamental right of all citizens to due process, because it subjects citizens of the United States to criminal trial and punishment, including imprisonment, by an "extraconstitutional," "third sovereign", *Lara*, 541 U.S. at 212-13 (Kennedy, J. concurring), within the borders of the United States but not created or authorized by the Constitution, that does not afford defendants all the rights provided by the Bill of Rights and, in fact, excludes them from political participation in the tribe's affairs on the basis of their race or ethnicity.[3]

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[3] Indian tribes are racially exclusive because no person who is not an Indian may be a member of an Indian tribe. They are ethnically exclusive because their membership is restricted further, excluding even Indians who are not descended from the appropriate tribe or tribes. Thus, qualification for tribal membership is expressed in terms

(Continued on following page)

The United States and tribal defendants argue the distinction is "political," not racial, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) (federal employment preference for Indians in the Bureau of Indian Affairs was not racial discrimination but was reasonable and rationally designed to further Indian self-government). They argue this is so because the 1990 Amendments swept into Tribes' criminal jurisdiction Indians who are enrolled members of a tribe and perhaps other racial "Indians," but not all Indians.

The Ninth Circuit recognized "the equal protection argument has real force." App. 69. It noted:

> [A]lthough the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation. (Citing *Oliphant*, 435 U.S. at 194.) This makes Means' case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the

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f "blood quantum." *See* Constitution of the Confederated Salish and Kootenai Tribes, as amended, Title I, Ch. 1, Part 1, requiring one-quarter "Salish or Kootenai blood" to be a tribal member (Section 2), and defining "Indian Blood," unless the context requires otherwise, as meaning "the blood of either or both the Kootenai or the Salish Tribes of the Flathead Reservation." Using their own inherent sovereign power, of course, tribes have been authorized to further limit membership in ways repugnant to the Constitution based on immutable factors. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding the equal protection guarantee in ICRA did not allow a federal remedy against a tribal membership law that excludes the children of female members who marry outside the tribe but extends membership to the children of male members who marry outside the tribe. *Id.* at 51-55.

> State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[4] As an Oglala-Sioux, Means can never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

Id. at 932.

Notwithstanding this, the Ninth Circuit found *Morton v. Mancari*, 417 U.S. 535 (1974), held "that federal statutory recognition of Indian status is 'political rather than racial in nature,'" despite noting that *Mancari* concerned the "distinguishable context of Indian employment preferences by the federal government." *Means*, 432 F.2d at 932. *See also Duro*, 495 U.S. at 689-90 (emphasizing the importance of the distinction between Congressional and administrative provisions treating Indians "as a single large class with respect to *federal* jurisdiction" as opposed to

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[4] Original footnote: "*See Talton*, 163 U.S. at 382-85, 16 S.Ct. 986; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are imposed. They are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)." *See also Nevada v. Hicks*, 533 U.S. 353, 383-85 (2001) (Souter, J. concurring, joined by Kennedy, J. and Thomas, J.).

"*tribal* power to treat Indians by the same broad classification.") Rejecting the argument that *Mancari* had been "undermined" by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), because, it noted, the Court and the Ninth Circuit continue to "rely" on *Mancari*, the Circuit Court held it was "bound to follow it under the doctrine of *Agostini v. Felton*," 521 U.S. 203, 237 (1997).[5] As support for this proposition, the lower court cited *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000), without addressing the fact that this Court, in *Rice*, and in *Mancari*, carefully noted "the case was confined to the authority of the BIA, an agency described as 'sui generis.'" *Rice*, 528 U.S. at 520; citing *Mancari*, 417 U.S. at 554. *See also Duro*, 495 U.S. at 689-90, noting same distinction.

The Ninth Circuit rejected the facial due process challenge out of hand, describing it as having "no force." App. 75. The Circuit held:

> Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, (citing *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896),) the Indian Civil Rights Act confers all the criminal procedure protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed counsel if he cannot afford an attorney. (Citation omitted.)

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[5] *Agostini* reaffirmed that "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which **directly controls**, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini*, 521 U.S. at 237, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). (Emphasis added.)

> The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor. (Citation omitted.) The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction. (Citation omitted.) Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

App. 75-76.

The Ninth Circuit did not address the issues raised by a federal statute subjecting U.S. citizens to criminal trial and punishment by an extraconstitutional sovereign unconstrained by the Constitution and which, by its very nature, excludes them from participating in its political life because of their race or ethnicity. Thus, it did not address the "elementary principle" of the "constitutional structure and the consent upon which it rests," which guarantees "political freedom" and liberty. *Lara*, 541 U.S. at 213 (Kennedy, J. concurring). *See also Duro*, 495 U.S. at 694, quoting from the dissent of Stevens, J. from the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-73 (1982), noting that nonmembers of a tribe "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."

I. Federal Common Law and Statutory Background.

The Court held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes no longer retain inherent sovereign authority to exercise criminal jurisdiction over nonmembers who are non-Indians, *id.* at 194, and that revival of such power would require a

Congressional delegation of federal power. *Id.* at 211-12. In *Duro v. Reina*, 495 U.S. 676 (1990), this Court held that under federal common law Indian tribes also lack this jurisdiction over nonmembers who are Indians. *Id.* at 682. Finding no principled reason for nonmember Indians but not non-Indians to suffer the disability of criminal trial and punishment by an extraconstitutional sovereign, the Court held "Tribe's powers over [nonmember Indians] are subject to the same limitations." *Id.* at 688. While recognizing that Congress might address any "jurisdictional gap" that existed from the lack of tribal criminal jurisdiction over nonmember Indians, *id.* at 692, the Court also noted that "[c]riminal trial and punishment" is a "serious intrusion on personal liberty," and that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. *Cf. Reid v. Covert*, 354 U.S. 1 (1957)." *Id.* at 693 (parallel citations omitted).

Before the year was out, in the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §§ 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990), and without holding a hearing, Congress overturned that holding by amending 25 U.S.C. § 1301 to state that the phrase "powers of self-government" "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. . . . " The only limit on the term "all Indians" was reference to the case law under 18 U.S.C. § 1153, the Indian Major Crimes Act, defining who is an "Indian."

Decisions under that section, beginning with the seminal case of *United States v. Rogers*, 45 U.S. 567 (1846), make it clear the primary, indispensable and

immutable factor for classification as an "Indian" is racial. As the Court held in *Rogers*, a non-Indian adopted by a tribe may make himself

> . . . amenable to their laws and usages. Yet he is not an Indian; and the exception (in the predecessor to 18 U.S.C. §1153) is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, – of the family of Indians. . . .

Rogers, 45 U.S. at 572-73.

The case law since 1846 has not diverged from this. Rather, the cases consistently note the obvious: the racial aspect of the issue as to who is an "Indian" for purposes of 18 U.S.C. § 1153 is indispensable, while the political aspect – enrollment in a tribe or, indeed, non-enrollment – is not determinative. *See United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979) (While enrollment is the common evidentiary means of establishing Indian status, it is not the only means nor is it necessarily determinative.); *U.S. v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) ("[E]nrollment or lack of enrollment is not determinative of . . . status as an Indian."); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938) ("The lack of enrollment . . . is not determinative of status. Only Indians are entitled to be enrolled . . . and the fact of enrollment would be evidence that the enrollee is an Indian. But the refusal of the Department of Interior to enroll a certain Indian as a member of a certain tribe is not necessarily an administrative determination that the person is not an Indian."); *U.S. v. Dodge*, 538 F.2d 770, 786 (8th Cir. 1976) ("The definition of exactly who is and who is not an Indian is very imprecise. (Citation omitted.) Courts have generally followed the test discussed

in *U.S. v. Rogers*, 45 U.S. 567 (1846): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian.") Thus, it is clear that race is the one indispensable and immutable factor in this determination.[6]

Although the language of the 1990 Amendments referring to "all Indians," by itself, requires no reference to legislative history, the House Report accompanying the amendments, H.R. Conf. Rep. No. 101-938, pt. 2 (1990), 136 Cong. Rec. H13556, H13596 (Oct. 24, 1990), only confirms the point, revealing Congress' intent to make a racial, not political, distinction. The Report noted that the cases under 18 U.S.C. § 1153 "made no distinction regarding the tribal membership of the Indian. The status of non-member Indians . . . was clarified in *U.S. v. Rogers*, 45 U.S. 567 (1846), where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians." U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 375.

The legislative history reveals the same intent: "Courts have repeatedly held that the term 'Indian' includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted.) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes includes the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country." *Id.* (The rationale provided by Congress for doing this is, essentially, that there was a purported "gap" in

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[6] Significantly, beyond race, defining who is or is not an Indian is "very imprecise." *Dodge, supra.*

jurisdiction after *Duro* to prosecute crimes allegedly committed by nonmember Indians on reservations and that these crimes "are the most tedious crimes with which law enforcement officers deal." *Id.* at 373.)

By these amendments, therefore, Congress subjected nonmembers who are Indians, but no others, to trial and punishment, which includes imprisonment for up to one year and a fine of up to $5,000 for each offense, 25 U.S.C. § 1302(7), by Indian tribes using, in that process, their extraconstitutional inherent sovereign power. Thus, they are not constrained by the Constitution but are only limited, to some extent, by ICRA, 25 U.S.C. §§ 1301, *et seq.*, and the only federal remedy is habeas corpus. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978). Congress explicitly specified only members of one race, American Indians, for such treatment. It left nonmembers of any other race but who are no less or more authorized to be on an Indian reservation free from the threat of criminal prosecution by Indian tribes. It appears Congress did so, in large part, to relieve state and federal law enforcement of having to deal with "the most tedious crimes." *Id.*

II. Proceedings Below.

Petitioner Thomas Morris was cited by a tribal police officer of the Confederated Salish and Kootenai Tribes with a criminal violation – speeding – of the Tribes' code. App. 48. At his first appearance in tribal court, Mr. Morris moved to dismiss the charge on the ground the Tribes lack jurisdiction to try and punish him. The same day, Mr. Morris filed a complaint in federal district court raising the same issues. The tribal court, and the tribal appellate court, ultimately ruled the tribes have jurisdiction to try and

punish Mr. Morris. By agreement of the parties, the prosecution of Mr. Morris in tribal court has been stayed pending the resolution of this matter in the federal courts.

An illustrative and significant factual distinction between prosecution in the CSKT Tribal Court and Montana state district court concerns the right to a jury. If Mr. Morris was prosecuted in state district court, which he will be if this Court rules in his favor, he would have a right, under Montana law to a jury trial, *Woirhaye v. Montana Fourth Judicial District Court*, 292 Mont. 185, 191, 972 P.2d 800, 803 (1998), and the jury would have to be seated in conformity with state and federal constitutional requirements. *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986). In fact, Thomas' mother, Elizabeth Morris, also a nonmember but not an Indian, would have this right under the same accusation. In Thomas' case, by contrast, simply because he is an Indian, he does not have a right to a jury trial, the trial judge in his case, by tribal statute, must be a tribal member, Law and Order Code of the Confederated Salish and Kootenai Tribe ("CSKT") (2003) 1-2-202(5), and even if tribal law did allow a jury, only tribal members could be seated. *Id.* at 1-2-601.

The federal district court initially declined to address Morris' Fifth Amendment equal protection and due process claims. App. 35. After remand from the Ninth Circuit, App. 19, it held that the distinction Congress made in the 1990 Amendments between nonmember Indians, which it subjected to tribal criminal jurisdiction, and nonmember non-Indians, which it did not treat in this way, is "political" and not "racial." It relied for this holding on *Morton v. Mancari*, 417 U.S. 535 (1974). Consequently, it did not subject the 1990 Amendments to strict scrutiny, requiring

instead only a rational basis, which it found in Congress' policy of promoting tribal self-government.

Morris again appealed. The Ninth Circuit ultimately affirmed the lower court in an Amended Memorandum filed December 22, 2005, but did not issue a substantive opinion, since it was bound by its prior ruling in *Means v. Navajo Nation*, 432 F.3d 924 (2005), filed December 13, 2005. The lower court therefore also rejected Morris' motion for rehearing and rehearing *en banc* on December 22, 2005. On March 22, 2006, it also rejected Means' motions for rehearing and rehearing *en banc*. App. 56. The Circuit's opinion in *Means*, therefore, provides the rationale for its holding in *Morris*.

REASONS FOR GRANTING THE PETITION

There is not conflict among the circuits here that Morris can discern, except perhaps the comparison between the fact that Congress must comply with the equal protection and due process clauses when enacting legislation under its general Commerce Clause power with its license, according to the Ninth Circuit and Respondents, under the Indian Commerce Clause resting on the legal fiction that the classification "Indian" is political, not racial. But the equal protection and due process questions reserved from decision in *Lara* concern perhaps the most fundamental structural principles in the Constitution relating to and protecting individual citizens' rights. These are important questions of federal law this Court should settle.

Resolution of the equal protection questions relates directly to only 4.1 million American citizens – Indians. They should not be shunted off the now well-trod and much fought-over road to protection and respect for equal rights on the grounds of a fiction such as that employed here – that the classification "Indians" is not first, foremost, and always a racial classification, but a "political" one. *Adarand*, 515 U.S. at 240 (Thomas, J. concurring); *Lara*, 541 U.S. at 214 (Kennedy, J. concurring).

The due process question is, however, even more compelling, and perhaps more currently at issue for the Nation at large. It asks no less than whether Congress, when exercising well-recognized constitutional powers, may place American citizens outside the protections of the Constitution for purposes of criminal prosecution and punishment for their actions within the confines of the country. This question concerns not aliens or even American citizens who, it might be demonstrated, pose a threat to the Nation and the lives and property of its people through acts of war.

Rather, it concerns American citizens who happen to be on an Indian reservation, whether living there or passing through, and are accused of a misdemeanor, a "tedious" crime other law enforcement, it was claimed, prefer not to handle. U.S. Code Congressional and Administrative News, Vol. 2, 102d Congress, 1st Session, 1991 at 373. This question does not concern "only" Indians. It is separate from the equal protection question. If Congress has the power, constitutionally, to subject Indian citizens to such extraconstitutional treatment, there is no principled reason it would not also have the power to do so with non-Indian citizens, at least in circumstances it deems warranted. Moreover, if it can do so when Americans are

in certain, specified **federal** Indian reservations, there is no reason it could not do so when they are in other, or all **federal** locations, such as Military reservations, territories, wilderness areas, National Parks, or Washington, D.C. Such power is "of major significance to [the] understanding and interpretation of the Constitution . . . and most doubtful" and "unprecedented." *Lara*, 541 U.S. at 211, 212 (Kennedy, J. concurring).

Morris respectfully submits these questions warrant this Court's immediate attention and settling.

If the "fiction" that consent to be a member of one Indian tribe is consent to the inherent sovereign power of all Indian tribes – including their power to imprison – makes "Indian" merely a "political" and not a racial classification, even though only American citizens of the Indian race are adversely impacted, then the 4.1 million Americans who are Indians, and their relatives, should have that explanation from this Court. The public understanding of the law, especially that segment directly and adversely affected by it, deriving from this Court's pronouncements more than any source, is of course vital to our political and legal life. As it is, to the common citizen, the law at issue appears to be a racial classification pure and simple.

Similarly, if Congress has the constitutionally valid power to relegate American citizens to criminal trial and punishment, including potentially imprisonment, by an extraconstitutional tribunal, unconstrained by the Constitution, for mere misdemeanors, American citizens of all races, Indians or not, should know the source, the reason, the location and the limit, if any, of such power.

I. THE APPARENTLY EGREGIOUS EQUAL PROTECTION AND DUE PROCESS VIOLATIONS AT THE FOUNDATION OF THE 1990 AMENDMENTS WARRANT SETTLEMENT BY THE COURT TO PROTECT OUR JURISPRUDENCE ON THESE FUNDAMENTAL MATTERS.

First, there are American citizens, nonmember Indians, languishing in tribal jail facilities, who were tried and convicted by a sovereign that was not required to comply with the Constitution and which excluded them from full and equal political participation because of their ethnicity – they lacked the requisite amount of "blood quantum" to be a member of that tribe. In almost all cases, if they were allowed a jury under tribal law its venirepersons were, by tribal law, exclusively tribal members – i.e. no person of the defendants race or ethnicity would have been allowed on the panel. Whether these criminal defendants were guilty of crimes or not, their subjection, by Congress, to such "extraconstitutional" power is, if not unjust, begging for explanation as to how it is fair.

Indians may be the quintessential minority in the United States. Their numbers are small – 4.1 million citizens affiliated with a tribe, according to the latest census, 1.7 million of which are enrolled tribal members[7] – and they are scattered from corner to corner of the country, with 556 federally-recognized tribes residing on

[7] U.S. Department of Commerce, Economics & Statistics Administration, U.S. Census Bureau, March 2001, Overview of Race & Hispanic Origin. Notably, the U.S. Census Bureau's definition of an "American Indian" states that it refers to people who have native origins and "who maintain tribal affiliation or community attachment."

reservations in virtually every state of the Union. They are among the poorest of the poor. In the rural areas of the West, out of sight, many live in forlorn poverty. In many urban areas of the West and beyond, including Seattle, Portland, Albuquerque, Phoenix, Denver, and Minneapolis they are perhaps more prominent as they constitute a disproportionately large number of the homeless and fringe-dwellers. While tribal governments have budgets, departments, police forces and courts, as well as lobbyists and the institutional support of the U.S. Department of Justice, many though certainly not all Indians, as individuals, live in exceedingly difficult straits.

Their interests and rights can easily be overlooked, especially when they are considered as a racial group rather than as individuals. But, as the Supreme Court has rightly found, the 556 tribes are not fungible, *Duro v. Reina*, 495 U.S. 676, 695 (1990), and neither are individual Indians, who should be assumed to be no less desirous or deserving of protection for their individual rights than any other citizen of the United States.

As the Court has stated:

> [I]t is the individual who is entitled to judicial protection against classifications based upon his race or ethnic background because such distinctions impinge upon his personal rights, rather than the individual only because of his membership in a particular group. . . .

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

Because they are citizens of this country, Indians, in theory, have the opportunity equal to all other citizens and many resident aliens to work their way out of the difficulties in which many of them live. It is up to them as individuals to put this theory into practice. But, Morris submits, the

disability, the odium, of racial classification by the federal government and Congress has had the very adverse effects the Supreme Court has long said our Constitution is meant to protect against. *Adarand*, 515 U.S. at 240-41 (Thomas, J. concurring).

This situation is, in fact, similar to that of indigent criminal defendants, the only group as easily overlooked, perhaps, as nonmember Indian criminal defendants. The Supreme Court recognized that they have fundamental constitutional rights which cannot be ignored simply because of their penury. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In that case the powers of governments were ranged against individuals seeking protection of their rights, whether guilty or not, whether rich or poor. The governments offered intricate legal arguments and what they saw as compelling practical reasons to allow their practices to continue in a manner convenient to their power but in conflict with individual rights. The Court, of course, came down ultimately on the right side, the side of the individual, the side of the Constitution, as amended and improved to the benefit of individuals through long years of struggle. *See Adarand*, 515 U.S. at 240-41.

By contrast, in the nation-threatening circumstances of World War II, Congress provided for the internment of Japanese-Americans. The Supreme Court then approved this. *See Hirabayashi v. U.S.*, 320 U.S. 81 (1943) and *Korematsu v. U.S.*, 323 U.S. 214 (1944). All now recognize the constitutional violations these acts of Congress represented and enabled. The 1990 Amendments differ in principle from the internment laws at issue during World War II only, but significantly, because here Congress has acted not to address perceived threats to the Nation but a perceived gap in policing "tedious" petty crimes.

While Congress committed another shameful act when it passed the 1990 Amendments, this Court can avoid that stain. It should, not only for the benefit of 4.1 million individual citizens of the United States who are Indians, but to preserve from erosion the progress of this Nation under the lofty principles of equality, even if only for so small a minority.

Respectfully submitted,

JON METROPOULOS
(*Counsel of Record*)

Attorney for Petitioners
April 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS LEE A MINOR CHILD, a minor child; ELIZABETH S. MORRIS; ROLAND J. MORRIS, SR., his guardians and natural parents, Plaintiffs-Appellants, v. TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, Defendant-Appellee, UNITED STATES OF AMERICA, Defendant-Intervenor-Appellee	No. 03-35922 DC No. CV 99-0082 DWM AMENDED MEMORANDUM* (Filed Dec. 22, 2005)

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Argued and Submitted March 11, 2005
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submission Vacated March 30, 2005
Resubmitted August 23, 2005
Filed August 25, 2005

Memorandum Withdrawn December ___, 2005

Before: FERNANDEZ, TASHIMA, and GOULD, Circuit Judges.

Thomas Lee Morris appeals the district court's grant of summary judgment in favor of defendant, Judge Winona Tanner, and defendant-intervenor, United States. For the past six years, Morris has had criminal speeding charges pending against him in the tribal court of the Confederated Salish and Kootenai Tribes ("CSKT") in Montana. Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, but is not a member of the CSKT. He challenges the jurisdiction of the tribal court. The district court granted summary judgement against Morris. *Morris v. Tanner,* 288 F. Supp. 2d 1133, 1144 (D. Mont. 2003). Morris appealed.

Morris challenges the jurisdiction of the CSKT tribal court, which was confirmed by the 1990 amendments to the Indian Civil Rights Act ("ICRA") to extend to "all Indians" in criminal cases. *See* Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1856, 1892 (1990) (amending 25 U.S.C. § 1301). He contends that the 1990 amendments violate principles of equal protection and due process. In our recent opinion in *Means v. Navajo Nation,* No. 01-17489, 2005 WL 3370585 (9th Cir. Dec. 13, 2005), however, we squarely addressed and rejected both of these challenges to the 1990 amendments to the ICRA.[1] We are

[1] In *Means,* we also held that " 'all Indians' recognized by the 1990 amendments means all of Indian ancestry who are also Indians by political affiliation [*i.e.,* who are enrolled members of a federally

(Continued on following page)

therefore bound by *Means* to reject Morris' challenges as well. The judgment of the district court is therefore

AFFIRMED.

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recognized tribe], not all who are racially Indians." *Means*, 2005 WL 3370585, at *3.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS LEE A MINOR CHILD, a minor child; et al., Plaintiff-Appellants, V. TANNER, Judge, Judge of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, Defendant-Appellee, UNITED STATES OF AMERICA, Defendant-Intervenor-Appellee	No. 03-35922 DC No. CV-99-0082-DWM **JUDGMENT**

Appeal from the United States District Court for the District of Montana (Missoula).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 12/22/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.,	CV 99-82-M-DWM
Plaintiffs,	ORDER
vs.	(Filed Oct. 28, 2003)
JUDGE TANNER, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	
Defendant,	
and	
UNITED STATES OF AMERICA,	
Intervenor.	

Before the Court are the United States' motion to dismiss and Plaintiff's and Defendant's motions for summary judgment. The State of Montana has filed an amicus curiae brief on behalf of the defendant.

I. Background

Plaintiff Thomas Lee Morris and his parents Elizabeth and Roland challenge the constitutionality of the 1990 amendments to the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301(2), which affirm tribal court jurisdiction

over all Indians, not just Indians who are members of the prosecuting tribe.[1]

Morris is an enrolled member of the Chippewa Tribe from the Leech Lake Reservation in Minnesota. On June 13, 1999, he was cited for speeding near Ronan, Montana, on the Flathead Indian Reservation. Morris was ordered to appear in the Flathead Reservation Tribal Court. The Flathead Reservation is the home of the Confederated Salish and Kootenai Tribes ("CSKT" or the "Tribes"), in which Morris is not enrolled. Morris filed a motion to dismiss the tribal action against him. The motion was denied. He also filed an action for declaratory and injunctive relief in federal court, claiming the Tribes had no jurisdiction over him. The tribal defendants in the federal action filed a motion to dismiss, which was granted by this Court on October 5, 1999. This court's brief order relied on the 1990 Indian Civil Rights Act amendments. Morris appealed to the Ninth Circuit. On July 24, 2001, the Ninth Circuit reversed and remanded.

The Ninth Circuit's Memorandum states that this Court erred in not considering Morris' constitutional arguments regarding the 1990 Indian Civil Rights Act amendments. This Court did not fully consider whether the amendments violated Morris' equal protection rights under the Due Process Clause, and whether they violate the principle of separation of powers. The Ninth Circuit remanded for consideration of these issues, as well as of whether there is a due process claim aside from equal

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[1] Morris was a minor at the commencement of this lawsuit so his parents appeared as his guardians. He has now reached the age of majority.

protection. The heart of the Ninth Circuit's direction reads "the district court should consider whether the term 'Indian' as used in the 1990 amendments amounts to a political or racial classification." If the classification is racial, the amendments must pass strict scrutiny. If it is political, the amendments are subject to rational basis review. "The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to 'Indians' who are not enrolled in, or otherwise affiliated with, any tribe." The 9th Circuit further directed this court to consider whether the amendments violate the doctrine of separation of powers under its ruling in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001).

Plaintiff's Complaint includes the following counts: Count I (Federal Common Law), that CKST lacks retained inherent sovereign jurisdiction over non-members of the Tribes for criminal prosecution; Count II (Constitutional-Due Process), that the prosecution, whether derived from the amendments or federal common law, violates Morris' right to due process, because the tribal court is not subject to the Bill of Rights; Count III (Constitutional Equal-Protection), that the prosecution violates Morris' equal protection rights because it is based on race distinctions; and Count IV (Separation of Powers), that the amendments are unconstitutional because Congress' affirmation of tribal jurisdiction violates the separation of powers doctrine.

II. Parties' Arguments

A. The United States' Motion to Dismiss

The U.S. entered this case as an Intervenor following the remand from the Ninth Circuit, in order to argue on behalf of the constitutionality of an Act of Congress. The U.S.'s motion to dismiss tracks the questions posed by the Ninth Circuit. In sum, the motion states that the ICRA amendments are reviewed under rational basis, since Indians[2] are a political and not racial classification; there is a rational basis for the law; and therefore, there is no constitutional infirmity.

First, Acts of Congress are presumed constitutional. U.S.'s Mot. to Dismiss Br., 10-11. Acts of Congress relating to Indian affairs are given particular deference. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1979). The U.S. Supreme Court has upheld the constitutionality of Congressional acts that distinguish Indians from other groups. *United States v. Antelope*, 430 U.S. 641, 645 (1977).

Acts singling out Indians are therefore subject to rational review, based on Indians as a political class, rather than strict scrutiny based on Indians as a racial group. U.S.'s Mot. to Dismiss Br., 12; *Antelope*, 430 U.S., at 645-650; *Fisher v. District Court*, 424 U.S. 382, 391 (1976); *Mancari*, 417 U.S. at 555. "Indian" is defined in ICRA as the same as under 18 U.S.C. § 1153, which has been interpreted in common law as membership in or affiliation with a federally recognized tribe. *LaPier v. McCormick*,

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[2] The term "Indian" is used advisedly in this order. No disrespect is intended toward those who prefer the term Native American. Indian is used here because of the statutory and common law terminology, as well as the self-identification of many members of the CSKT.

986 F.2d 303, 305 (9th Cir. 1992); U.S.'s Mot. to Dismiss Br., 13-14. The ICRA amendments are rationally related to the government's goals of Indian self-governance and law enforcement on the reservations. U.S.'s Mot. to Dismiss Br., 15-16. In addition, so many non-member Indians live on reservations and partake of tribal services that it is rational for the criminal laws to apply to them as well, in a comprehensive scheme of reservation life. U.S.'s Mot. to Dismiss Br., 16.

The United States' second argument is that Morris fails to state a claim because the ICRA amendments do not violate due process. U.S.'s Mot. to Dismiss Br., 17-18. By being a tribal member, one chooses to be subject to ICRA in tribal court, not the Bill of Rights.

The United States' final argument is that the ICRA amendments do not violate separation of powers because Congress had the power, due to its control over federal common law, to enact legislation that contradicted the decision of the Supreme Court. Congress has also always had plenary authority over Indian affairs. U.S.'s Mot. to Dismiss Br., 19.

B. Defendant's Motion for Summary Judgment

The Tribal Defendant, Judge Winona Tanner, has moved for summary judgment. Her argument contains five parts: 1.) the Tribes may prosecute Morris as a function of their retained inherent sovereign powers; 2.) the comprehensive tribal, state, and federal criminal prosecution scheme is consistent with the U.S. Constitution and reflects the unique status of Indian tribes' sovereignty; 3.) the Ninth Circuit has determined Morris' claim is a facial challenge to the statute, and he can not meet the burden

of proving such a claim; 4.) Morris cannot bring an as-applied challenge because he has not exhausted his tribal remedies, it is beyond the scope of federal judicial review of tribal courts, and he has failed to submit his claim to the President for arbitration as required by his tribe's treaty with the U.S.; and 5.) justice in Indian country is best served by this jurisdictional scheme. Def.'s Sum. Judg. Br., 2.

Judge Tanner starts out by clarifying the procedural posture of Morris' claims before this Court, following remand from the Ninth Circuit. The Tribes conclude that Morris' fourth claim, regarding the Tribal Court's inherent jurisdiction over him as a non-member Indian and whether such jurisdiction violates the doctrine of separation of powers, was decided by the Ninth Circuit's opinion in *U.S. v. Enas;* therefore, Morris' claim is moot in this Court. Def.'s Sum. Judg. Br., 5.

The Tribes' substantive arguments are as follows. First, the Tribes possess an inherent sovereign power to prosecute Morris. This power comes from two sources. First, the Tribes retained the power to prosecute by the terms of the Hellgate Treaty. Def.'s Sum. Judg. Br., 6. The Tribes possessed a form of judicial function prior to the Hellgate Treaty, and the Treaty preserved to them their exclusive use and benefit of the Flathead Reservation. Treaties were a grant of rights *from* the Tribes, not an assignment of rights *to* them. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998); *United States v. Winans*, 198 U.S. 371, 380-82 (1905). Therefore, the Tribes never gave up their judicial authority over the Flathead Reservation.

Second, federal law affirms the right of the Tribes to prosecute Indians. Def.'s Sum. Judg. Br., 7. Powers not

explicitly withdrawn from tribes by Congress are retained, unless those powers are withdrawn by implication as a necessary result of the Tribes' dependent status. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999); *United States v. Wheeler*, 435 U.S. 313, 322 (1978). In *Duro v. Reina*, 495 U.S. 676 (1990), the United States Supreme Court held that tribes' sovereign powers did not include the authority to prosecute non-member Indians, while acknowledging that Congress has ultimate authority over Indian affairs. *Duro*, at 698. Congress responded to this decision by passing the 1990 amendments to the Indian Civil Rights Act, finally enacted as P.L. 102-137, 105 Stat. 646 (1991); 25 U.S.C. §§ 1301-1303. With this amendment, Congress chose to "recognize and affirm" tribal misdemeanor prosecutorial authority over "all Indians on their respective reservations." H.R. Conf. Rep. 101-938, 101st Cong. 2d Sess. 132 (1990). Defendant claims that by drafting the law this way, Congress avoided impermissibly delegating prosecutorial power to the Tribes, but rather enabled it. *United States v. Enas*, 255 F.3d 662, 673-75 (9th Cir. 2001). In *Enas*, the Ninth Circuit wrote that the "1990 amendments are therefore appropriately characterized as a recognition and confirmation of the tribes' inherent sovereign criminal jurisdiction over all Indians." *Enas*, at 679. See also *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), cert. granted (Sept. 30, 2003); *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1998). Defendant claims that *Enas* disposes of Morris' first and fourth claims.

Defendant's second major argument is that the tribal prosecution scheme is consistent with the U.S. Constitution. Def.'s Sum. Judg. Br., 9. Defendant argues that Indian law is unique, and due process and equal protection

claims have repeatedly failed in the area of Indian law. Def.'s Sum. Judg. Br., 9. *United States v. Archambault*, 174 F. Supp.2d 1009, 1023 (D. So. Dak. 2001). A keystone to this argument is the holding in *Morton v. Mancari* that "Indian" is a political rather than racial designation. 417 U.S. 535, 552-54 (1974). *See also U.S. v. Antelope*, 430 U.S. 641, 642-50 (1977).

To fall under the jurisdiction of the Confederated Salish and Kootenai tribal court, a defendant must be "an enrolled member of a federally-recognized tribe." Def.'s Sum. Judg. Br., 10; Memo. of Agreement for Retrocession of Criminal Misdemeanor Jurisdiction Between State of Montana, et al., and the Confederated Salish and Kootenai Tribes, 3 ("For purposes of the Agreement an 'Indian' is a person who is an enrolled member of a federally-recognized tribe."). Indian status for federal criminal jurisdiction requires voluntary membership or affiliation with a federally recognized tribe, in addition to an ancestral or racial element. *LaPier v. McCormick*, 986 F.2d 303-305 (9th Cir. 1992); *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974); *United States v. Rogers*, 45 U.S. 567 (1845). Therefore, an individual's subjection to tribal criminal jurisdiction is voluntary, because one can give up one's tribal enrollment; one cannot relinquish one's race.

Further, tribes themselves are not constrained by the Bill of Rights in the same fashion as other sovereign bodies in the United States. Def.'s Sum. Judg. Br., 11; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). The Indian Civil Rights Act was passed to impose most of the constraints of the Bill of Rights on tribes, with a few exceptions. Def.'s Sum. Judg. Br., 11.

The CSKT have also enacted a federally-approved tribal code, thereby providing sufficient protection to the rights of defendants brought before the tribal court. Def.'s Sum. Judg. Br., 12. In addition, the State of Montana, which did have concurrent jurisdiction over reservation misdemeanors under Public Law 280, retroceded this jurisdiction to the tribes in 1994, returning to the CSKT the authority to prosecute member and non-member Indians on the Reservation for traffic violations such as Morris'. Def.'s Sum. Judg. Br., 13. The Memorandum of Agreement for Retrocession between Montana and the CSKT evinces a clear intent to distribute the law enforcement and judicial duties among the three sovereigns. Def.'s Sum. Judg. Br., 13. The United States Bureau of Indian Affairs accepted this Retrocession. 60 Fed.Reg. 33318 (June 27, 1995).

Tanner's third major argument is that the Ninth Circuit Court of Appeals construed Morris' challenge as a facial challenge to the 1990 amendments, and that Morris cannot carry the burden that challenge imposes. Br., 14. The Ninth Circuit concluded that Morris was not challenging his particular prosecution in the CSKT court, but rather the constitutionality of the 1990 amendments altogether.[3] A facial challenge to an act requires a litigant to prove there would be no set of circumstances under which the Act is valid. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); Br., 14. Tanner then argues that if the amendment is constitutionally sound as applied to Morris, then he is not permitted to argue that it might not apply constitutionally to another litigant. *Broadrick v. Oklahoma*, 413

[3] The specific question of Morris' prosecution by CSKT was the basis for this Court's October 5, 1999 dismissal order.

U.S. 601, 610 (1973); Br., 14. Tanner argues that this point dispenses with Morris' second and third claims, because Morris' prosecution does not violate his due process and equal protection rights under the Fifth Amendment. Br., 15.

Tanner's fourth major point is that Morris' claim cannot go forward as an as-applied challenge, because his prosecution has been stayed in tribal court pending this suit over the constitutionality of the amendments. His tribal action has not been fully adjudicated so his claims there are not exhausted. Federal review is inappropriate. Def.'s Sum. Judg. Br., 15-16; *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Further, the exclusive route of an as-applied challenge to the ICRA amendments is through a petition for habeas corpus under 25 U.S.C. § 1303. Def.'s Sum. Judg. Br., 17. Tanner argues that Morris could only avoid tribal exhaustion by framing his claim as a facial challenge. Def.'s Sum. Judg. Br., 17; *Morris v. Tanner*, 99-36007, slip op. at 6 (9th Cir. (Mont.) Aug. 15, 2001.) Third, the Chippewa Tribe's Treaty with the U.S. requires that the tribe and its members (of which Morris is one) "submit all difficulties between them and other Indians to the President and to abide by his decision in regard to the same . . . " Def.'s Sum. Judg. Br., 18; 1855 Treaty with the Chippewa, Art. 9., 10 Stat. 1165 (Feb. 22, 1885), 1855 WL 5610 (Trty).

Tanner's final argument is that the current jurisdictional scheme, allowing tribal jurisdiction over non-member Indians, is in the best interest of public health and safety in Indian Country. This conclusion was the basis of Congress' *Duro* Fix, in order to avoid a prosecutorial void over these

Indians on reservations such as the Flathead. H.R. Rep. No. 61, 102nd Cong., 1st Sess., 372-73 (1991); Def.'s Sum. Judg. Br., 18. Also, allowing this jurisdiction comports with other safety and welfare programs on the reservation. Def.'s Sum. Judg. Br., 19.

Plaintiff responded to both the United States' motion to dismiss and Tanner's motion for summary judgment in the same brief. Plaintiff has two primary arguments. First, the 1990 ICRA amendments rely on a racial distinction and therefore are unconstitutional on their face. Pl.'s Response Br., 5. Morris claims that his position does not depend on *Morton v. Mancari* being reversed. Pl.'s Response Br., 8 n. 8. " . . . [T]he 1990 amendments, uniquely among federal enactments, impose heavy burdens on nonmember Indians while not imposing similar burdens on nonmember non-Indians, who are similarly situated in relation to Tribes." Pl.'s Response Br., 7. Morris relies on *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), and *Rice v. Cayetano*, 528 U.S. 495 (2000), for elucidation of the strict scrutiny required of all laws distinguishing citizens on the basis of race. Pl.'s Response Br., 7-8. Plaintiff also relies heavily on a law review article that argues that the *Duro* Fix was unconstitutional. L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. Davis L. Rev., 53, 63 (1994); Pl.'s Response Br., 9. Plaintiff also argues that Congress may not violate the Constitutional rights of individual Indians as citizens of the United States, despite whatever authority Congress might have over *tribes*. Pl.'s Response Br., 13.

Plaintiffs' second main argument is just that Tanner failed to address and that the United States has "essentially conceded" Morris' due process claim. Pl.'s Response Br., 14.

C. Plaintiff's motion for summary judgment

Morris has also moved for summary judgment, arguing almost the identical points of his response above. The motion addresses three questions: 1.) do the 1990 Amendments violate Fifth Amendment equal protection guarantees because they are a racial classification; 2.) do they violate Fifth Amendment due process rights because they allow tribes to punish citizens without the protection of the U.S. Constitution; and 3.) do they violate the principle of the separation of powers?[4]

Morris argues that this court's review of the 1990 amendments must be under strict scrutiny, since "Indian" is a racial rather than political designation. The amendments single out a race, non-member Indians, for negative treatment. Pl.'s Response Br., 11. ICRA's definition of Indian is not limited to enrolled members of tribes, but to Indians more generally. "[T]he 1990 amendments rely on the definition of Indian developed by cases under 18 U.S.C. § 1153." Pl.'s Response Br., 12. Morris cites *U.S. v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979), *U.S. v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), and *Ex parte Pero*, 99 F.2d

[4] Morris recognizes in his brief that the United States Court of Appeals for the Ninth Circuit decided this question in its opinion in *United States v. Enas*. 255 F.3d 662 (2001), but retained this question in his brief in order to "preserve their claim."

28, 31 (7th Cir. 1938) for the proposition that enrollment alone does not define Indian for application of § 1153. Morris focuses on the fact that to be an Indian in these terms, one must most likely possess some Indian blood. Therefore it is a racial distinction.

Plaintiff further relies on the U.S. Supreme Court's opinions in *Adarand Constructors, Inc. v. Pena*, *supra*, and *Rice v. Cayetano*, *supra*, to claim that a statute like this one, that relies on racial classifications, must withstand strict scrutiny.

Plaintiff emphasizes the part of *Adarand* that says laws that impose a special burden on members of a minority are particularly abhorrent. Pl.'s Response Br., 15-16. "They are just the type of federal action burdening a distinct, disfavored minority that all the justices in *Adarand* agreed require strict scrutiny. Their effect is most certainly to 'perpetuate a caste system.'" Pl.'s Response Br., 16.

Finally, Plaintiff claims that the ICRA amendments violate the Fifth Amendment right to due process because they subject citizens to criminal prosecution without the protections of the U.S. Constitution. Pl.'s Response Br., 18. Plaintiff relies on *Duro v. Reina* for the idea that tribal punishment is such a violation. Pl.'s Response Br., 18.

IV. Analysis

A. Standard for Summary Judgment

The material facts are not in dispute.[5] Rather, this conflict is over the constitutionality of an Act of Congress. The record includes a number of documents beyond the pleadings. Pursuant to Fed. R. Civ. P. 12(b), the United States' Motion to Dismiss will be treated as a motion for summary judgment. Therefore there are three motions for summary judgment pending before the Court.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party must establish that no genuine issue of material fact exists. A material fact is one that is relevant to an element of a claim or defense, and its materiality is determined by the substantive law governing the claim or defense. *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Once a moving party meets its burden that no genuine issues of material fact exist, the burden shifts to the party opposing summary judgment to show specific material facts which

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[5] Plaintiff filed a statement of uncontroverted facts that falls far outside the bounds of what is appropriate under Local Rule 56.1 and contains considerable legal argument. Defendants have objected to these facts. Defendants' objections, to the extent they refute legal conclusions, are well-founded. However, the facts underlying this Court's conclusions are not in dispute.

remain at issue. *Kaiser Cement Corp. v. Fischbach & Moore*, 793 F.2d 1100, 1103-1104 (9th Cir. 1986).

B. The Ninth Circuit's Remand

1. Do the ICRA amendments violate Morris' Fifth Amendment equal protection rights?

The Ninth Circuit's direction on remand to this Court orders first that this Court determine whether Indian, as used in the 1990 amendments and ICRA statute, is a political or racial distinction. Plaintiff argues fervently that it is a racial distinction, based on the fact that some form of racial component is an element of the definition of Indian, in addition to membership in a federal tribe. Morris argues that the fact that he, a non-member Indian, is subject to CSKT tribal jurisdiction, and a non-Indian, non-member is not, creates a racially-based distinction in prosecution.

The United States Supreme Court explained in *Morton v. Mancari*, 417 U.S. 535 (1974), that Indian for the purpose of federal legislation is a political rather than racial designation.[6] As the Supreme Court explained in *U.S. v. Antelope*, federal regulation of Indian crimes was "rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed

[6] Plaintiff cites a number of cases or situations in which the conclusion of *Morton v. Mancari* is questioned. See, e.g., Pl.'s Sum. Judg. Br., 16. However, it is not the place of this court to predict the future but rather to abide by the law as it now stands.

as legislation of a '"racial group" consisting of "Indians" . . . '". 430 U.S. at 646 (citation omitted.) *See also U.S. v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996); *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976). The distinction is somewhat confusing, of course, because blood quantum is usually an element of tribal membership. However, in this particular instance, CKST policy prescribes that tribal prosecutions of "Indians" means federally-enrolled Indians. Memo. of Retrocession, 3. Racial appearance as an Indian is not enough, and conversely, there are clearly many CKST members who do not appear racially Indian but who are enrolled members of the tribe.

Further, the voluntary nature of tribal membership, like citizenship, is crucial to keep in mind. While one might be unhappy to relinquish one's tribal membership in order to avoid future prosecution by a tribal court, one could still do so. One could never give up one's race in the same way, and in fact, much of the equal protection law in this country is founded on an aversion to disadvantage based on involuntary, immutable characteristics.

The political versus racial distinction is not intuitively grasped. However, a consideration of the mutual history of Indian tribes and European settlers on this continent illuminates the distinction between the treatment of Indians as a political entity and the treatment of, say, African-Americans as a racial group. Indians were here, with fully functioning governmental and juridical institutions, before their contact with European settlers. As time passed, phases of contact, combat, and conquest resulted in varying degrees of negotiation and power struggle between the Europeans and Indians. This situation is entirely distinct from the situation of Africans who were brought to this country enslaved and deprived of their

governmental structures before arrival. The rhetoric of race relations derived from the history of African-Americans is only partially applicable to the situation of Indians, and to overlook the crucial differences minimizes the great respect owed to the remaining sovereignty of tribes. Indian tribes gave up many of their rights by treaty and reserved much to themselves that would not conflict with the expanding United States. Over time, much of what was reserved has been taken, through Congressional legislation and through legal decisions. However, what was not taken, by law remains. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999).

Plaintiff relies on *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), to bolster his argument that this distinction is racial. *Rice* and *Adarand* are, as Plaintiff argues, useful clarifications of the strict scrutiny applied to laws that make racial distinctions. However, as that is not the case here, they are beside the point.[7]

Further, neither case deals directly with any Indian law questions. The majority in *Rice* had the opportunity to analogize the situation of Hawaiians to Indian law, as the State of Hawaii urged them to, and explicitly chose not to.

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[7] I conclude that Indian is a political distinction, based on the *Morton v. Mancari* line of cases. However, even were Indians simply a racial group, I conclude that the ICRA amendment would easily pass strict scrutiny. Strict scrutiny of a racial distinction requires that the legislation is a narrowly tailored measure that furthers a compelling governmental interest. *Adarand* at 227. The United States and the tribal governments have compelling interests in the self-governance of the tribes, the public health, safety, and welfare of the reservations, and effective and thorough law enforcement on the reservations. The ICRA amendments are necessary and narrowly tailored to meet those needs.

Rice, 528 U.S. at 518. Any discussion of Indian law in that case is in the form of counterpoint or distinction, as dicta, and is not the holding of the case. *Adarand* is also beside the point. The issue in *Adarand* was what means a government could use to remedy racial discrimination. The issue here is preservation, in accordance with the United States' trust obligation, the independent, quasi-sovereign status of Indian nations.

Since the distinction is political, rather than racial, the 1990 amendments are subject to rational basis review. The record is clear that the law easily passes the test. There are significant numbers of non-members Indians on the Flathead Reservation. U.S. Br., 16 (citing the House Hearing in which the CKST Tribal chair claimed 2000 + nonmember Indians on the Flathead reservation). The law needs to be enforced against them. The state of Montana does not exercise jurisdiction over Indians on the reservation for regulatory actions, such as speeding tickets and DUIs.[8] The tribes have misdemeanor jurisdiction and jurisdiction of these regulatory violations over Indians on the reservation. 25 U.S.C. 1302(7).[9] If this jurisdiction were limited to member Indians, large numbers (perhaps 2000) of residents of the reservation could commit misdemeanor crimes and regulatory violations without any risk of prosecution. The basis of Congress' *Duro* Fix was to

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[8] The Flathead Reservation is unique in the state of Montana as a P.L. 280 reservation, on which the state was authorized to prosecute felonies. The federal government maintains its exclusive prosecutorial jurisdiction on Montana's other reservations, under the Major Crimes Act. The difference does not matter in this instance; however, the ICRA amendments are intended to apply uniformly across Indian country.

[9] This limitation on tribes is implicit in the law that restricts punishments the tribal courts can impose to one year maximum in jail.

avoid a jurisdictional prosecutorial void over these Indians on reservations such as the Flathead. H.R. Rpt. 102-61, 3-4 (1991); S. Rpt. 102-168, 1, 3; S. Rpt. 102-153, 7 (1991); U.S. Br., 15-16, 18.

In addition, non-members Indians have access to BIA health and social services on the reservation, and the CKST must dispense these services to CKST and other non-CSKT tribal members "fair[ly] and uniform[ly]." 25 U.S.C. § 450j(h). Nonmembers also receive police and fire services while on the Reservation and other benefits of tribal government. Therefore, the benefits they receive by living on Flathead are counterbalanced by the burden of submitting to CKST tribal jurisdiction. Further, all tribes benefit by the United States' expressed desire and policy to further self-governance and uphold its treaty obligations, wherever the tribes' individual members may reside.[10]

2. Is there a due process claim other than equal protection?

The Ninth Circuit also directed this Court to consider whether Morris had a due process claim separate from his equal protection claim. Count II of Morris' complaint appears to be a due process Bill of Rights claim, arguing that the tribal court cannot prosecute a citizen without that citizen having the protection of the Bill of Rights. However, all Indians are also citizens of the United States.

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[10] The Ninth Circuit also directed this Court to consider "whether the amendments apply to 'Indians' who are not enrolled in, or otherwise affiliated with, any tribe". That question need not be answered to decide the matter at hand, and a consideration of it would be advisory. There would likely be a constitutional problem with such a situation, but it is not at hand here.

Congress, in allowing tribal courts to prosecute Indians and in developing ICRA in the first place, has developed a scheme that respects the quasi-sovereign status of tribes and their inherent authority but also assures individuals of their rights in tribal courts. ICRA contains all of the constitutional measures that protect federal defendants except that one may be tried before a jury of six, and grand jury presentment is not required. 25 U.S.C. § 1302. Further, ICRA does contain a habeas corpus provision that allows defendants in tribal court to petition a federal court in the case of illegal detention by a tribal court. 25 U.S.C. § 1303. The United States Supreme Court determined in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that ICRA may result in Indians being subject to tribal laws that would not be constitutionally sound if passed by a state or federal entity, due to Congress' plenary power over Indian affairs and the unique status of reservation Indians.

In any case, Morris' argument about a Seminole being hauled into another tribe's court for which he did not vote is misleading. Pl.'s Response Br., 13. Non-Indian citizens are called into courts of other states all the time, brought before judges whom they did not elect and subject to laws they may not support. That is what ICRA is for, to provide assurances that individuals will have a mechanism through which to receive protection against unjust prosecution and detention. Morris' situation does differ insofar as a Seminole may never be allowed to vote in a CSKT election, whereas a resident of another state can change

residencies and gain the right to vote.[11] But the mere application of laws by another sovereign is not, in itself, a violation of one's rights. ICRA provides a sufficient floor of rights that protects all Indians of all tribes no matter in which tribal court they find themselves and provides them a mechanism for federal review with complete constitutional protection.

3. Do the ICRA amendments violate the principle of separation of powers?

The Ninth Circuit also directed this Court to determine whether the 1990 amendments violate the principle of separation of powers, considering the Circuit's decision in *U.S. v. Enas.* In *Enas*, the Ninth Circuit concluded, contrary to its earlier decision in *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), that the ICRA amendments were an affirmation of tribal power, and that Congress was authorized to pass the law, because the Supreme Court's opinion rested on federal common law and not the Constitution. *Enas*, 255 F.3d, at 673-74. Congress therefore legally exercised its power in passing the amendments. 255 F.3d at 675. The 8th Circuit reached the same conclusion in *U.S. v. Lara*, 324 F.3d 635 (8th Cir. 2003).

In addition, Supreme Court jurisprudence has consistently held that Congress has plenary authority over Indian affairs. *Mancari v. Morton*, 417 U.S. at 551-52; *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73,

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[11] Convicted felons often lose their rights to vote permanently, yet are still, of course, subject to the laws established by representatives for whom they are barred from voting.

83-84 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Therefore, this law does not violate the principle of separation of powers.

4. Does the CKST have inherent power to prosecute Morris?

Morris's Claim I concerns the inherent power of the Tribes to prosecute Morris. Morris says that this claim is not before the court anymore because the Ninth Circuit had decided that it was undisputed that the court could not prosecute Morris without the amendments. Pl. Sum. Judg. Br., 5 n.5. However, that is not the conclusion I draw – *Duro* had withdrawn the power, or appeared to, and the amendments reaffirmed its existence. *Enas*, 255 F.3d at 669-71. Indeed, without Congressional action, the state of the law would be as the Supreme Court determined it to be in *Duro*. However, Congressional action revived the law (or the power) as it was before the *Duro* decision. The Tribal Defendants dealt with this claim accurately at page 3 of their Response to Morris' Brief in support of Summary Judgment. Therefore, Defendant will be granted summary judgment on Claim One.

For the foregoing reasons, it is HEREBY ORDERED that the United States' motion to dismiss (dkt #60) is GRANTED, the Defendant's motion for summary judgment (dkt #65) is GRANTED, and the Plaintiff's motion for summary judgment (dkt #53) is DENIED.

The Clerk of Court is directed to enter judgment in favor of the Defendant.

Dated this 28th day of October, 2003.

/s/ Donald W. Molloy
DONALD W. MOLLOY,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

[LOGO]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA – MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.,

Plaintiffs,

V

JUDGE TANNER, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLAT-HEAD RESERVATION,

Defendant,

and

UNITED STATES OF AMER-ICA,

Intervenor.

JUDGMENT IN A CIVIL CASE

(Filed Oct. 28, 2003)

CV-99-82-M-DWM

____ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendant and Intervenor and against Plaintiff in accordance with the attached order.

PATRICK E. DUFFY,
CLERK OF COURT

Dated: October 29, 2003 /s/ M. Nub
By Deputy Clerk

FILED, ENTERED and NOTED CIVIL JUDGMENT BOOK VOLUME 89 PAGE 5084

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH S. MORRIS, gal, THOMAS LEE a minor child by and through his guardian, his natural parents; RONALD J. MORRIS, SR., gal, THOMAS LEE a minor child by and through his guardian, his natural parents,

Plaintiffs-Appellants,

v.

TANNER, Judge, Judge of the CONFEDERATED SALISH and KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,

Defendant-Appellee.

No. 99-36007

D.C. No. CV-99-82-DWM

MEMORANDUM*

(Filed Jul. 24, 2001)

Appeal from the United States District Court
District of Montana
Donald W. Malloy, District Judge, Presiding.

Argued and Submitted on
March 8, 2001 Seattle, Washington

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Plaintiff-appellant Thomas Lee Morris ("Morris"), by and through his guardians and natural parents, Elizabeth S. Morris and Ronald J. Morris, Sr., brings this declaratory and injunctive relief action challenging the constitutionality of the 1990 amendments to the Indian Civil Rights Act ("ICRA") (hereinafter referred to as the "1990 amendments" or the "1990 ICRA amendments").

Morris is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. He is not a member of the Confederated Salish & Kootenai Tribes of the Flathead Reservation (the "Confederated Tribes"). On June 13, 1999, Morris was driving a car near Ronan, Montana, within the territory of the Confederated Tribes, when a Ronan City Police officer cited Morris for speeding and ordered him to appear in the Flathead Reservation Tribal Court ("Tribal Court"). Morris appeared in the Tribal Court, entered a plea of not guilty, and filed a motion to dismiss the complaint against him. His motion was denied by the defendant, Judge Tanner, of the Confederated Tribes.

Morris next filed the present action in federal district court, seeking a declaration that the Confederated Tribes lack criminal jurisdiction over him because he is an Indian who is a member of another tribe (a "non-member Indian"). Morris also seeks an injunction prohibiting the Confederated Tribes from continuing to exercise criminal jurisdiction over him in light of his non-member Indian status.

The district court dismissed Morris's complaint on the ground that the 1990 ICRA amendments permit tribes to exercise criminal jurisdiction over non-member Indians. In so ruling, the district court did not address Morris's

allegations in the complaint that the 1990 amendments violate the equal protection component implicit in the Due Process Clause of the Fifth Amendment, and the principle of separation of powers. Morris timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse.

I.

The District Court Erred In Granting Defendant's Motion to Dismiss Without Addressing the Constitutional Issues Raised in the Complaint

As set forth above, in granting the defendant's motion to dismiss, the district court found only that the 1990 amendments permit the Confederated Tribes to exercise criminal jurisdiction over non-member Indians such as Morris. The district court did not address Morris's assertions in the complaint that the 1990 amendments themselves are constitutionally infirm, because they violate his right to equal protection and the principle of separation of powers.[2]

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[2] Specifically, Morris's complaint includes four causes of action through which he seeks the following relief: (1) a declaration that the Tribal Court lacks inherent criminal jurisdiction over Morris, a non-member Indian; (2) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to due process; (3) a declaration that regardless of whether the Tribal Court's criminal jurisdiction over Morris derives from the 1990 amendments or federal common law, the exercise of that authority violates Morris's right to equal protection; and (4) a declaration that the 1990 amendments are unconstitutional because they violate the principle of separation of powers. In conjunction with each of these requests for declaratory relief, Morris also seeks an injunction prohibiting the Tribal Court from exercising criminal jurisdiction over him.

The fact that the district court erred in dismissing the complaint without addressing the alleged constitutional violations, however, does not mean that we must reverse the district court's decision granting the defendant's motion to dismiss. Under the law of this circuit, we may "affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record." *Kimes v. Stone*, 84 F.3d 1121, 1126 (1996) (citing *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994)). Thus, we must consider whether the district court's decision dismissing Morris's complaint is otherwise supported by the record. If the record supports the dismissal of Morris's complaint, then the district court's error in failing to address Morris's constitutional claims was harmless.

II.

The District Court's Dismissal of Morris's Complaint Was Not Harmless Error

The defendant suggests two reasons why the district court's decision to dismiss Morris's complaint amounts to harmless error. First, the defendant argues that under the ICRA, Morris may only challenge the constitutionality of the Confederated Tribes' exercise of criminal jurisdiction over him by means of a habeas petition rather than through the present action for declaratory and injunctive relief. Second, the defendant argues that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution. Because both of these arguments lack merit, we find that the district court should have reached the merits of Morris's constitutional claims.

First, Morris may properly challenge the constitutionality of the 1990 amendments in the present suit for declaratory and injunctive relief. The defendant correctly notes that under the ICRA, 25 U.S.C. § 1303, a habeas petition is the "exclusive means for federal-court review of tribal criminal proceedings." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67 (1978) (interpreting 25 U.S.C. § 1303 to mean that there is no implied right of action in federal district court for declaratory and injunctive relief under the ICRA). However, Morris's case is framed not as a challenge to the jurisdiction of the tribal court, but rather as a challenge to an act of Congress. As Morris explains, "[t]he issue is not whether Tribes are subject to constitutional limitations and judicial review but whether Congress is."

By framing his argument as a challenge to an act of Congress, Morris avoids the remedial constraints of 25 U.S.C. § 1303. Although *Santa Clara Pueblo* held that under 25 U.S.C. § 1303 there is no implied right of action for declaratory and injunctive relief to enforce the substantive provisions of the ICRA, 436 U.S. at 51-52, 98 S.Ct. 1670, Morris does not bring this suit pursuant to the ICRA. Rather, this suit arises under the court's federal question jurisdiction to review the constitutionality of congressional legislation. *See* 28 U.S.C. § 1331. Therefore, 25 U.S.C. § 1303 does not prevent the district court from reaching the merits of Morris's constitutional claims.

The defendant's second argument – that Morris's constitutional claims lack merit because the Confederated Tribes' exercise of criminal jurisdiction over Morris is not subject to the constraints of the Constitution – is similarly unavailing. Under our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001), it is undisputed

that the Confederated Tribes could not presently exercise criminal jurisdiction over Morris, a non-member Indian, in the absence of the 1990 amendments. The 1990 amendments may therefore be characterized as *enabling* the Confederated Tribes's exercise of criminal jurisdiction over Morris. This enabling legislation is subject to constitutional review and must comport with the equal protection component of the Fifth Amendment and the principle of separation of powers. Therefore, because Morris has framed his appeal as an attack on the constitutionality of the 1990 amendments rather than as an attack on the constitutionality of the Confederated Tribes's exercise of criminal jurisdiction, the district court must reach the merits of Morris's constitutional claims.

III.

The Question Whether the 1990 ICRA Amendments Violate the Principles of Equal Protection and Separation of Powers is Remanded to the District Court to Consider in the First Instance

Because the district court dismissed Morris's complaint without addressing the constitutional issues raised therein, we remand this matter to the district court to consider in the first instance whether the complaint adequately states a claim for relief. Thus, the district court must consider the question whether the 1990 ICRA amendments violate the equal protection component of the Fifth Amendment or the principle of separation of powers.

In considering whether the 1990 amendments violate the Fifth Amendment,[3] the district court should consider whether the term "Indian" as used in the 1990 amendments amounts to a political or racial classification. If the district court finds that the classification is racial, it should also consider whether the 1990 amendments satisfy strict scrutiny. If the district court finds that the classification is political, it should also consider whether the 1990 amendments satisfy rational basis review. The district court should further consider the reach of the 1990 amendments, and whether the amendments apply to "Indians" who are not enrolled in, or otherwise affiliated with, any tribe. In connection with these inquiries, the district court may wish to hold a hearing to further develop the factual record.

The district court should consider Morris's claim that the 1990 amendments violate the principle of separation of powers in light of our recent decision in *United States v. Enas*, 2001 WL 726669 (9th Cir. 2001).

IV.

Conclusion

For the reasons set forth above, the district court's decision granting the defendant's motion to dismiss for failure to state a claim is reversed, and the matter is remanded to the district court for further proceedings

[3] It is not clear whether Morris's complaint includes a due process claim that is separate from his equal protection claim. The district court should also consider this issue on remand.

consistent with this disposition. The panel shall retain jurisdiction over this case.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.;	
PlaintiffS,	CV-99-82-M-DWM
vs.	ORDER
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	(Filed Oct. 5, 1999)
Defendants.	

Plaintiff filed this action seeking 1) a declaratory judgment that the Confederated Salish and Kootenai Tribal Court lacks jurisdiction over a criminal complaint filed against him, and 2) an injunction prohibiting the Tribal Court from further proceeding. on the criminal complaint.

Plaintiff is an enrolled member of the Minnesota Chippewa Tribe who resides within the exterior boundaries of the Flathead Indian Reservation. He was issued a speeding citation which is being prosecuted in Tribal Court. He entered an plea of not guilty, and the Tribal Court is currently reviewing his motion to dismiss the charges against him. Pending before this Court is defendant's motion to dismiss. The Tribes' position is well taken.

In 1990, Congress amended the Indian Civil Rights Act to recognize and affirm that Indian tribes' power of self government includes "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians" on their respective reservations. 25 U.S.C. 1301.

The Ninth Circuit has held that "the 1990 amendments must be treated as an affirmative delegation of power" by Congress to Indian tribes. *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 947 (1998). The defendant in *Means* was a non-member Indian who was prosecuted in tribal court in 1997 for criminal behavior which allegedly occurred between 1978 and 1988. In holding that the 1990 amendments could not be applied retroactively to Means' conduct, the court observed "(i)t is clear that if Means' acts had occurred after the 1990 amendments were enacted, the amendments would govern." *Id.*

The language of the statute is clear, and has been interpreted to apply to all post-1990 criminal conduct by non-member Indians on Indian reservations.

Wherefore, IT IS HEREBY ORDERED that defendant's motion to dismiss (docket #6) is GRANTED and this action is DISMISSED.

DATED this 5th day of October, 1999.

/s/ Donald W. Molloy
Donald W. Molloy
United States District
Judge

Jon Metropoulos
GOUGH, SHANAHAN, JOHNSON & WATERMAN
33 South Last Chance Gulch
P.O. Box 1715
Helena, Montana 59624-1715
(406) 442-8560
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

THOMAS LEE MORRIS, a minor child, by and through his guardians, his natural parents, ELIZABETH S. MORRIS and ROLAND J. MORRIS, SR.;	
Plaintiff,	Cause No. CV-99-82-M-DWM
vs.	COMPLAINT
Judge Tanner, Judge of the CONFEDERATED SALISH AND KOOTENAI INDIAN TRIBAL COURT for the FLATHEAD RESERVATION,	(Filed Jun 15, 1999)

COMES NOW Plaintiff, Thomas Lee Morris, a minor child, ("Morris") by and through his guardians, his natural parents, Elizabeth S. Morris and Roland J. Morris, Sr. for his complaint against Defendant, Judge Tanner of the Confederated Salish and Kootenai Indian Tribal Court for the Flathead Reservation, and states as follows:

I. JURISDICTION AND VENUE

1. This Court has federal subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because the complaint raises the federal question of whether the Tribal Court of the Confederated Salish and Kootenai Tribes has jurisdiction over a criminal complaint filed against Plaintiff Morris by the Confederated Salish and Kootenai Tribes ("CSKT"). The Tribal Court of the CSKT has taken jurisdiction over such a matter in which Morris, a non-member of the Tribes, is named as a Defendant, and therefore a case and controversy exists for which Morris seeks injunctive relief and declaratory relief under 28 U.S.C. § 2201.

2. Venue lies in this judicial district and division by virtue of 28 U.S.C. § 1391(b) and Rule 105-3 of the Rules of Procedure for the U.S. District Court for the District of Montana in that the Defendants are residents in the territory within the boundaries of the Missoula Division of the District of Montana.

II. THE PARTIES

3. The Plaintiff, Morris, is a resident of Ronan, Montana, Lake County. He is not a member of the Confederated Salish and Kootenai Tribes. He is an enrolled member of the Minnesota Chippewa Tribe, Leech Lake Reservation, Minnesota. Morris is a minor of 16 years old.

4. Morris' guardians, Elizabeth S. Morris and Roland J. Morris, Sr. are not members of the Confederated Salish and Kootenai Tribes.

5. The Defendant, Judge Tanner, is an official of the Tribal Court of the Confederated Salish and Kootenai Tribes designated to preside over the criminal complaint

made against Morris. Morris seeks prospective equitable relief against her for acts which are *ultra vires.*

III. STATEMENT OF FACTS

6. The CSKT assert governmental authority over non-member Indians for certain criminal matters, including traffic offenses such as the one of which Morris is accused. Law and Order Code of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (hereinafter "CSKT Law and Order Code"), Chapter IV, Code of Tribal Offenses, Section H, Offenses Against Public Order, Health, and Decency, subsection H12, Traffic Offenses, at 45-46.

7. The CSKT Tribal Court exercises its jurisdiction, derived from the authority of the CSKT, to try and punish non-member Indians for certain criminal offenses, including traffic offenses such as the one of which Morris is accused.

8. The attached criminal complaint against Morris alleges a criminal offense which the CSKT claim they have authority to prosecute in their Court against non-member Indians such as Morris. Exhibit 1.

9. To determine whether to send an alleged traffic offender to Tribal Court or some other court, law enforcement officers on the Flathead Reservation directly ask the alleged defender his or her race. If the response is "Indian" or "Native American" or another designation conveying the same information about the person's race, the alleged offender is required to appear in Tribal Court to either plead guilty or defend themselves. Non-Indians are not sent to Tribal Court for traffic offenses. The determination

of whether or not to send an alleged traffic offender to Tribal Court is made, therefore, based on the race of the alleged offender.

10. On June 13, 1999, Morris was driving his family's vehicle in or near Ronan, Montana. At or near the intersection of Terrace Lake Road and Third Street, just east of Ronan, Morris was stopped – that is, temporarily restrained from liberty, (See CSKT Law and Order Code, Ch. III, Sec. A2, Definition 28), by a member of the Ronan City Police Department, a law enforcement officer as defined by the pertinent provision of the CSKT Law and Order Code, (Ch. III, Sec. A2, Def. 17), for allegedly exceeding the speed limit in that area. When asked by the officer whether he is a tribal member, Morris responded that he is a member of a tribe in Minnesota, to wit, the Leech Lake band of Chippewa. The officer so noted on the Complaint against Morris. (Ex. 1.)

11. Because the CSKT assert jurisdiction for criminal matters over non-member Indians, the officer indicated on the complaint that Morris would be tried in CSKT Court. He was given a notice to appear in the Tribal Court of the Confederated Salish and Kootenai Tribe on June 15, 1999 at 10:00 a.m.

12. Morris did appear at that time in that court. Judge Tanner announced that was the time and place to take a plea from Morris in the matter of *CSKT v. Morris*, number 096A 19204. Ex. 1. Morris asked for a jury trial, pled not guilty, and filed the motion to dismiss for lack of jurisdiction attached hereto as Exhibit 2.

13. The citation requiring Morris to appear in Tribal Court indicates the punishment for his alleged offense, if he is found guilty, will be $100.

14. If Morris is found guilty of the alleged offense, his driving record and his insurance, both in terms of rates and availability, will be adversely affected. Morris' parents pay for his insurance at this time.

IV. COUNTS

COUNT I
(Federal Common Law)

15. Morris realleges and incorporates by reference ¶'s 1-14 above.

16. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over the criminal complaint against Morris because they do not have retained inherent sovereign authority over non-members of the Tribes for criminal purposes under federal common law.

COUNT II
(Constitutional – Due Process)

17. Morris realleges and incorporates by reference ¶'s 1-14 above.

18. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over Morris because the exercise of such authority, whether it derives from amendments made in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) or from federal common law, violates Morris' rights to due process by subjecting him, a citizen of the United States, to criminal prosecution in a tribunal not subject to the Bill of Rights or other constitutional constraints.

COUNT III
(Constitutional – Equal Protection)

19. Morris realleges and incorporates by reference ¶'s 1-14 above.

20. The Confederated Salish and Kootenai Tribes, and therefore their Tribal Court, lack jurisdiction over Morris because the exercise of such authority, whether it derives from amendments made in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) or from federal common law, violates Morris' rights to equal protection by treating him, because of his race, in a manner that differs from the treatment given other individuals who are not members of a tribe and who are not Indian.

COUNT IV
(Constitutional – Separation of Powers)

21. Morris realleges and incorporates by reference ¶ 's 1-14 above.

22. The amendments Congress enacted in 1990 to 25 U.S.C. § 1301 by Pub. L. No. 101-511 § 8077 (1990) are unconstitutional and invalid in so far as they purport to recognize, confirm, or affirm tribal sovereign authority for criminal matters over non-member Indians because they violate the Constitution's central mechanism of separation of powers.

V. REQUEST FOR RELIEF

WHEREFORE, Morris respectfully requests that this Court:

(1) Issue a declaratory judgment pursuant to 28 U.S.C. 2201 that, as a matter of federal common law and constitutional law, Tanner, his colleagues who are Tribal Court Judges, their agents, servants, employees, attorneys, successors in office, and those persons in active concert with them, lack authority to resolve the matters raised in the criminal complaint against Morris because the CSKT lack authority over, and therefore the Tribal Court lacks jurisdiction over, that matter.

(2) Issue a preliminary and a permanent injunction restraining and enjoining Tanner, his colleagues who are Tribal Court Judges, their agents, servants, employees, attorneys, successors in office, and those persons in active concert with them, from asserting or attempting to exercise jurisdiction over the criminal complaint filed in the Tribal Court of the Confederated Salish and Kootenai Tribes against Morris, a non-tribal member, on the grounds that as a matter of federal common law and constitutional law the CSKT lack authority over, and therefore the Tribal Court lacks jurisdiction over, the matter presented in the criminal complaint against Morris.

(3) Grant Plaintiff such further relief as the Court may deem proper.

RESPECTFULLY SUBMITTED this 15th day of June, 1999.

GOUGH, SHANAHAN, JOHNSON
& WATERMAN

/s/Jon Metropoulos
Jon Metropoulos

CERTIFICATE OF SERVICE

I, Shanni K. Schilling, hereby certify that a copy of the foregoing *Complaint* along with a written notice of the commencement of this action and request for waiver of service of a summons was filed and served upon the following by mailing a true and correct copy thereof on this 15th day of June, 1999, addressed as follows.

Judge Tanner
Confederated Salish and Kootenai Tribal Court
Confederated Salish and Kootenai Tribe
P O Box 278
Highway 93 West
Pablo, MT 59855-0278

/s/ Shanni K. Schilling
Shanni K. Schilling

EXHIBIT 1

App. 48

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT

ISSUED BY: CITY OF RONAN POLICE DEPT. 096A 19204

☐ STATE OF MONTANA
☐ CITY OF RONAN
☐ Capitol

VS.

☐ THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☐ CSKT

COURT OF Ronan DEPT. #

COUNTY OF LAKE

LOCATED AT RONAN CITY COURT ROOM CSKT

RONAN Pablo MONTANA ON OR BEFORE

THE 15 DAY OF June 19 99 TO ANSWER THIS CHARGE

ON THIS ____ DAY OF ____ 19 ____ THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Manuel

STREET 221 Round Butte Rd

CITY Ronan STATE MT ZIP 59864

SEX M WT 180 HT 5A0 DATE OF BIRTH MO 12 DAY 9 YEAR 72

D/L NO H2617K00 D/L STATE MT D/L EXP. YEAR 03

HOME PHONE EMPLOYER BUSINESS PHONE

VEHICLE LICENSE NO. 13 6N C

LIC. STATE MT EXPIRED YES NO

VEHICLE YEAR VEHICLE COLOR BLACK

VEHICLE MAKE Ford

VEHICLE TYPE
☐ CAR ☐ TRUCK
☐ PICKUP ☐ TRK/TRLR
☐ MOTORCYCLE ☐ OTHER

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☐ Speeding SECTION # 61-8-310

ON THE 13 DAY OF June 19 99 AT 14:10 MILITARY TIME

UNIFORM VIOLATION CODE 5760-3

DOCKET NUMBER

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY Violate Exceeding reasonable speed Zone By Speeding 46 mph in a 25 mph zone

$100.00

NAMELY AT (LOCATION) Round Butte Rd 3rd St.

LOCATION CODE R D N A N

RECEIVED $ ____ AS APPEARANCE BOND

IF CHECKED ☐ PERSONAL APPEARANCE IN COURT REQUIRED.

☐ B.A. TEST GIVEN ☐ ACCIDENT

RADAR UNIT NO. ____ BADGE NO. 14 DIST NO. ____

SIGNATURE OF OFFICER

EXHIBIT 2

Jon Metropoulos
Gough, Shanahan, Johnson &
Waterman
33 South Last Chance Gulch
P O Box 1715
Helena, MT 59624-1715
(406) 442-8560
Attorney for Defendant

IN THE TRIBAL COURT OF THE
CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION,
PABLO, MONTANA

CONFEDERATED SALISH AND KOOTENAI TRIBES, Plaintiff, v. THOMAS LEE MORRIS, Defendant.	Cause No. _____ **MOTION TO DISMISS**

COMES NOW Thomas Lee Morris, a minor child, ("Morris") by and through his guardians, his natural parents, Elizabeth S. Morris and Roland J. Morris, Sr. and respectfully moves this court to dismiss this criminal complaint against him with prejudice for the following reasons:

1. This Court lacks jurisdiction over Morris because he is a non-member of the Tribe.

2. Morris reserves the right to state other bases for his assertion that this court lacks jurisdiction over him as

the facts of this matter are developed and analyzed against controlling law.

A memorandum of law supporting this motion will be filed within five (5) days of filing this motion pursuant to Rule 14.3 and will explain in more detail the basis for this motion.

This motion is submitted in the interests of justice and not for any improper purpose.

RESPECTFULLY SUBMITTED this 15th day of June, 1999.

Gough, Shanahan, Johnson
& Waterman

/s/ Jon Metropoulos
Jon Metropoulos

CERTIFICATE OF SERVICE

I, Jon Metropoulos, hereby certify that a fax copy of the foregoing *Motion to Dismiss* was submitted in the Trial Court via HAND-DELIVERY and served upon the following by mailing a true and correct copy thereof on this 15th day of June, 1999, addressed as follows.

Clerk of Court of the Confederated
Salish and Kootenai Tribes
P.O. Box 278
Highway 93 West
Pablo, MT, 59855-0278

Confederated Salish and Kootenai
Tribal Prosecutor Rob Hunter,
Chief Legal Counsel,
Confederated Salish and Kootenai Tribes
P O Box 278
Highway 93 West
Pablo, MT 59855-0278

/s/ Jon Metropoulos
Jon Metropoulos

[SEAL] **U.S. Department of Justice**
Criminal Division

Washington, D.C. 20530

April 17, 2001

Honorable Cathy Catterson
Clerk, United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, CA 94105

Re: *Morris* v. *Tanner*, No. 99-36007
Argued and Submitted 3/8/01
Rule 28(j) Letter

Dear Ms. Catterson:

Would you kindly bring this letter to the attention of the panel in this case.

In the government's amicus brief in this case, at page 31, we cited to *Nofire* v. *United States*, 164 U.S. 657, 661-662 (1897), for the proposition that a non-Indian by ancestry was an "Indian" for criminal jurisdiction purposes when he was adopted by an Indian tribe. On closer inspection, *Nofire* does not stand for that proposition. *Nofire* involved a special federal statute that granted the Cherokee Nation exclusive jurisdiction over cases where all parties were members of the tribe, including, specifically, adopted members, notwithstanding the existence of federal jurisdiction. See 164 U.S. at 658; *Alberty* v. *United States*, 162 U.S. 499, 502 (1896). The general rule is that a non-Indian cannot, through his adoption by a tribe, define himself as an "Indian" for purposes of determining federal criminal jurisdiction. See *Duro* v. *Reina*, 495 U.S. 676, 694 (1990), citing *United States* v. *Rogers*, 45 U.S. 567 (1846). Nevertheless, "Indian status for purposes of federal criminal

jurisdiction requires voluntary membership or affiliation with a federally recognized tribe. See *LaPier* v. *McCormick*, 986 F.2d 303, 305 (9th Cir. 1992); *United States* v. *Heath*, 509 F.2d 16, 19 (9th Cir. 1974); see generally S. Rep. 102-168, 102nd Cong., 1st Sess. App. C, pp. 48-54 (1991) (legislative history of 1990 ICRA amendment). For equal protection purposes, this makes Congress' classification of "Indians" for federal criminal jurisdiction purposes one based on political affiliation with a tribe, not one based on race. See *United States* v. *Antelope*, 430 U.S. 641, 645-650 (1977).

In the 2000 Census, 4,119,301 persons identified themselves as being at least partly American Indian or Alaska Native. See Census 2000 Brief, Overview of Race and Hispanic Origin, p. 8, Table 6 (U.S. Dept. of Commerce, Economics and Statistics Administration, U.S. Census Bureau March 2001) (copy attached). As of 1999, the total enrollment of the 556 federally recognized tribes (including recognized Alaskan Native groups) was 1,698,483 persons. See 1999 Indian Labor Force Report p. i, (U.S. Department of the Interior, Bureau of Indian Affairs Office of Tribal Services 1999) (copy attached).

Respectfully submitted,

/s/ Richard A. Friedman

Richard A. Friedman
Attorney
U.S. Department of Justice
Criminal Division
Appellate Section
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899
(202) 514-3965

cc: Jon Metropoulos, Esq.
Joseph P. Hovenkotter, Esq.

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT — ISSUED BY: FLATHEAD TRIBAL POLICE DEPT. — T03A107038

STATE OF MONTANA
CITY OF _____ vs.
CS + KT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE 10:00 AM/PM

THE 6 DAY OF April 04

TO ANSWER THIS CHARGE

SIGNED THIS _____ DAY OF _____

THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Morris
STREET 221 Round Butte Rd
CITY Ronan STATE MT ZIP 59864
SEX M WT. 260 HT. 5'10" EYES Brn HAIR Brn DATE OF BIRTH NO. 17 DAY 19 YEAR 92
DR. NO. 12025198241119 DR. STATE MT DR. EXP. YEAR 2011
HOME PHONE 676-7402 EMPLOYER Wal Mart BUSINESS PHONE 883-6201

VEHICLE LICENSE NO. 15-F453 LIC. STATE MT NO. 6 YR. 04
VEHICLE MAKE SUBA VEHICLE YR. 1997 VEHICLE COLOR GLD
VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRACTOR/TRAILER ☐ MOTORCYCLE ☐ OV ☐ _____ ☐ OVH

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-6-302 (JAIL)

ON THE 17 DAY OF March 04 AT 2302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Operated the above named vehicle with a Bac above .08 as shown in affidavit.
- 61-6-302 Tribal Code -

NAMELY AT (LOCATION) Valley View Rd
LOCATION CODE Ronan
IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☐ BA TEST GIVEN ☐ ACCIDENT
EMP. ID. NO. T3-16
RADAR UNIT NO. _____ DETACH NO. _____
SIGNATURE OF OFFICER

RECEIVED
$ NONE
AS APPEARANCE BOND

DOCKET NUMBER

DEFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT — ISSUED BY: FLATHEAD TRIBAL POLICE DEPT. — T03A107039

STATE OF MONTANA
CITY OF _____ vs.
CS + KT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE 10:00 AM/PM

THE 6 DAY OF April 04

TO ANSWER THIS CHARGE

SIGNED THIS _____ DAY OF _____

THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas MIDDLE Lee LAST Morris
STREET 221 Round Butte Rd
CITY Ronan STATE MT ZIP 59864
SEX M WT. 260 HT. 5'10" EYES Brn HAIR Brn DATE OF BIRTH NO. 17 DAY 19 YEAR 92
DR. NO. 12025198241119 DR. STATE MT DR. EXP. YEAR 2011
HOME PHONE 676-7402 EMPLOYER Wal Mart BUSINESS PHONE 883-6201

VEHICLE LICENSE NO. 15-F453 LIC. STATE MT NO. 6 YR. 04
VEHICLE MAKE SUBA VEHICLE YR. 1997 VEHICLE COLOR GLD
VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRACTOR/TRAILER ☐ MOTORCYCLE ☐ OV ☐ _____ ☐ OVH

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-6-302

ON THE 17 DAY OF March 04 AT 2302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Operated the above named vehicle in a careless manner driving in an aggressive.
- Careless driving -

NAMELY AT (LOCATION) Valley View Rd
LOCATION CODE Ronan
IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☒ BA TEST GIVEN ☐ ACCIDENT
EMP. ID. NO. T3-16
RADAR UNIT NO. _____ DETACH NO. _____
SIGNATURE OF OFFICER

RECEIVED
$ NONE
AS APPEARANCE BOND

DOCKET NUMBER

112

App. 54

EFENDANT COPY

NOTICE TO APPEAR AND COMPLAINT

ISSUED BY FLATHEAD TRIBAL POLICE DEPT. T03A107040

☐ STATE OF MONTANA
☐ CITY OF _____) vs
☒ CSKT

THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN

☐ JUSTICE ☐ CITY ☐ YOUTH ☒ TRIBAL

COURT OF Tribal DEPT. NO. _____

COUNTY OF Lake

LOCATED AT Tribal Complex
Polson MONTANA

ON OR BEFORE Mon AM/PM

THE 18 DAY OF April 04
TO ANSWER THIS CHARGE

ON THIS _____ DAY OF _____
THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH WORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

DEFENDANT NAME: FIRST Thomas | MIDDLE Lee | LAST Mott

STREET 221 Round Butte Rd | VEHICLE LICENSE NO. 15-F453

CITY Pablo | STATE MT | ZIP 59864 | LIC. STATE MT | MO. 6 | YR. 04

SEX	WT.	HT.	EYES	HAIR	DATE OF BIRTH	MO.	DAY	YEAR	VEHICLE MAKE
M	200	5'11	BRO	BLK		12	19	67	SUBA

DR. NO. 170251982419 | DR. STATE MT | DR. EXP. YEAR 2011 | VEHICLE YR. 1987 | VEHICLE COLOR GLD

HOME PHONE 676-2402 | EMPLOYER Wal Mart | BUSINESS PHONE 883-6701

VEHICLE TYPE: ☒ CAR ☐ TRUCK ☐ PICKUP ☐ TRK/TRLR ☐ MOTORCYCLE ☐ CV ☐ _____ ☐ OVH

UNIFORM VIOLATION CODE | DOCKET NUMBER

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING:
☐ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☒ TRIBAL ORDINANCE SECTION NO. 61-13-103

ON THE 17 DAY OF March 04 AT 1302 MILITARY TIME

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
Failed to wear seat belt while driving the same motor vehicle.
- Seatbelt Violation -

NAMELY AT (LOCATION) Valley View Rd

LOCATION CODE 72015

IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED.
☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.
☐ BA TEST GIVEN
☐ ACCIDENT

RADAR UNIT NO. _____ EMP. ID. NO. TJ-16 DETACH NO. _____

RECEIVED
$ NONE
AS APPEARANCE BOND

SIGNATURE OF OFFICER

App. 55

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS, Petitioner-Appellant, v. NAVAJO NATION, a federally recognized Indian Tribe; et al., Respondents-Appellees.	No. 01-17489 D.C. No. CV-99-01057-EHC District of Arizona, Phoenix ORDER (Filed Mar. 22, 2006)

Before: KLEINFELD and RAWLINSON, Circuit Judges, and QUACKENBUSH, District Judge.*

Judges Kleinfeld and Rawlinson have voted to deny the petition for rehearing en banc, and Judge Quackenbush has recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

* The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

432 F.3d 924

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS,

Petitioner-Appellant,

v.

NAVAJO NATION, a federally recognized Indian Tribe; RAY GILMORE, Judge of the Judicial district of Chinle, Navajo Nation, Arizona; ROBERT YAZZIE, Chief Justice of the Navajo Nation,

Respondents-Appellees,

and

United States of America,

Respondent-Intervenor-Appellee.

No. 01-17489

D.C. No.
CV-99-01057-EHC

ORDER AND OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted October 10, 2002
Submission withdrawn November 19, 2003

Resubmitted January 28, 2005*
San Francisco, California
Filed December 13, 2005.

Before: Andrew J. Kleinfeld, Johnnie B. Rawlinson, Circuit Judges, and Justin L. Quackenbush,** District Judge.

Opinion by Judge Kleinfeld

COUNSEL

John Trebon, Trebon & Fine, P.C., Flagstaff, Arizona, for the appellant.

Donovan D. Brown, Sr., Acting Deputy Assistant Attorney General, Navajo Nation Office of the Attorney General, Window Rock, Arizona, for the appellees.

Thomas L. Sansonetti (briefed), Assistant Attorney General, U.S. Department of Justice, Env. & Nat. Resources Division, Washington, DC, for the intervenor.

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* We withdrew submission of this case when the Supreme Court granted certiorari in *United States v. Lara*, 324 F.3d 635 (8th Cir.), *cert. granted*, 539 U.S. 987 (2003), *rev'd*, 541 U.S. 493 (2004), because *Lara* appeared likely to resolve many of the important and difficult issues presented in this case. *Lara* was decided April 19, 2004, but on June 10, 2004, the United States advised the court that because this case challenged the constitutionality of a federal statute, the United States was entitled to intervene. *See* 28 U.S.C. § 2403(a); Fed. R. App. P. 44. The United States filed a motion to intervene as of right on September 2, 2004. We granted the United States' motion, and the court subsequently received further briefing by the intervenor, the parties, and amicus curiae.

** The Honorable Justin L. Quackenbush, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

Jon Metropoulos (briefed), Gough, Shanahan, Johnson & Waterman, Helena, Montana, for amicus curiae Thomas Lee Morris and Elizabeth S. Morris

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ORDER

The opinion filed August 23, 2005, and appearing at 420 F.3d 1037 (9th Cir. 2005), is withdrawn. Pursuant to General Order 5.3.a, an opinion is filed contemporaneously with this order. With the withdrawal and substitution of the opinion, the petitions for rehearing and rehearing en banc are denied as moot. Subsequent petitions for rehearing and rehearing en banc may be filed. Federal Rule of Appellate Procedure 40 now controls.

OPINION

KLEINFELD, Circuit Judge:

This case concerns whether an Indian tribe can exercise criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe.

Facts

This is an appeal from a denial of a petition for a writ of habeas corpus. The petitioner, Russell Means, an enrolled member of the Oglala-Sioux Indian Tribe, seeks to prevent the Navajo Nation from criminally prosecuting him in Navajo tribal court for an incident that occurred on the Navajo Reservation.

In December 1997, Means allegedly threatened and battered his then father-in-law, who is an Omaha Indian,

and allegedly threatened another man, a Navajo Indian. The offenses are misdemeanors under the Navajo Code, with potential maximum penalties of 90 days in jail and a $250 fine for each threat,[1] and 180 days in jail and a $500 fine for the battery.[2]

Means moved in the Navajo tribal court to dismiss the tribal proceedings. He argued that the tribal court had no jurisdiction over him because he was not a Navajo. Means testified that he is an enrolled member of the Oglala-Sioux Tribe of Indians and a permanent resident of Porcupine, a town in South Dakota on the Pine Ridge Sioux Indian Reservation. Means lived on the Navajo Indian Reservation from 1987 to 1997 when he was married to a woman who was a half-Navajo, half-Omaha Indian. Means moved back to the Sioux reservation in 1997, and the alleged offenses occurred later when Means was visiting the Navajo reservation.

Means testified that the difference between an Oglala-Sioux and a Navajo is analogous to the difference in nationalities between an American and a French person. Although Means lived on the Navajo reservation for a decade while married to his ex-wife, he could never become a member of the Navajo tribe because membership required at least one quarter Navajo blood.[3] Means does not speak Navajo, and as a non-Navajo, he had difficulty

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[1] *See* Navajo Nation Code tit. 17, § 310.

[2] *See* Navajo Nation Code tit. 17, § 316.

[3] Enrolled membership in the Navajo Nation is conditioned upon no less than one-fourth degree of Navajo blood. One may not become a Navajo by adoption or custom, and one cannot become a Navajo if he is an enrolled member of another Indian Nation or Tribe. *See* Navajo Nation Code tit. 1, §§ 701-703.

obtaining employment because of tribal preferences given to Navajos and restrictions that make it difficult for a non-Navajo to find employment, participate in civic life, and license a business.

The Navajo Nation trial court denied Means' motion to dismiss for lack of jurisdiction. Means appealed to the Navajo Nation Supreme Court which also denied his motion. The decision of the Navajo Supreme Court explains that the Navajo reservation covers about 25,000 square miles, making it larger than many U.S. states and foreign countries.[4] Over 9,000 Indians of other tribes live within the Navajo Nation, so domestic violence cases involving non-Navajo Indians arise from time to time. The Navajo Supreme Court explained that the considerable amount of violence arising from alcohol, when combined with the size and ethnic inclusiveness of the reservation, generates a "need to exercise criminal jurisdiction over all who enter the Navajo Nation," not just Navajo Indians. The Navajo Supreme Court decision says that while there are preferences for Navajos in employment and contracting, they are not absolute barriers, and that Means could have qualified for jury service in the Navajo tribal courts had he been registered to vote in Arizona. The Navajo Supreme Court also noted that, because Means had married a Navajo, he was a "hadane," or in-law, during his residence on the reservation, connected by rights and obligations to his wife's clan. As the Navajo Supreme Court notes, however, becoming a "hadane" does not make one a Navajo.

---

[4] The Navajo Reservation is almost three times the size of New Jersey.

After exhausting his remedies in the Navajo courts, Means petitioned the United States District Court for a writ of habeas corpus to enjoin the tribal courts from proceeding further in his case. The district court denied Means's petition, and he appeals.

Analysis

All the questions before us are purely matters of law and arise on appeal of the district court's denial of a writ of habeas corpus under 25 U.S.C. § 1303, so we review de novo.[5]

I. Jurisdiction

Means has exhausted his tribal court remedies regarding jurisdiction, but he has still not been tried for the alleged threats and battery. Nonetheless, Means remains subject to conditions of pretrial release. Means cannot have any contact with his former father-in-law or go within 100 yards of his former father-in-law's home. Means also must appear as ordered by the Navajo trial court or face re-arrest and additional punishment for any failure to appear. The district court therefore concluded that Means was in custody for purposes of habeas jurisdiction under *Justices of Boston Municipal Court v. Lydon*[6] and *Hensley v. Municipal Court*.[7] The parties have not

---

[5] *See McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir. 2002); *Moore v. Nelson*, 270 F.3d 789, 790-92 (9th Cir. 2001).

[6] *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-02 (1984).

[7] *Hensley v. Mun. Court, San Jose-Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 351-52 (1973).

challenged that conclusion before us, and, although we are required to examine jurisdiction *sua sponte*,[8] we agree with the district court. The charges against Means remain pending in the Navajo Nation trial court, and although the Navajo Nation and Means have stipulated to a stay in the trial court until this appeal is decided, the Navajo Nation states that it fully intends to prosecute Means if jurisdiction is resolved in its favor. Accordingly, we have jurisdiction to consider this appeal.

II. The 1990 Amendments to the Indian Civil Rights Act

In *Oliphant v. Suquamish Indian Tribe*,[9] the Supreme Court held that Indian tribes do not possess criminal jurisdiction over non-Indians.[10] In *Oliphant*, the Suquamish Tribe had prosecuted two non-Indians, one for racing down a highway and colliding with a tribal police car, and another for assaulting an officer and resisting arrest.[11] The tribe did not claim that Congress had given it authority to exercise jurisdiction, but rather that the tribe had an inherent sovereign authority to exercise criminal jurisdiction over incidents that occurred on its reservation – an authority that Congress had never taken away.[12] The Supreme Court disagreed and held that, although Indian tribes enjoy some sovereign powers, their "domestic,

---

[8] *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002).

[9] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[10] *Id.* at 194.

[11] *Id.*

[12] *Id.* at 195-96.

dependent"[13] nature distinguishes them from the governments of foreign countries.[14] It also held that citizens of the United States who are not Indians cannot be subjected to Indian tribal sovereignty for criminal purposes.[15]

Following *Oliphant*, the Supreme Court suggested in *United States v. Wheeler*[16] that the inherent sovereignty of a tribe might extend only to its own enrolled members.[17] Then, in *Duro v. Reina*,[18] the Court explicitly held that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."[19] *Duro* reasoned that, as American citizens,[20] Indians were entitled not to be subjected to the criminal authority of sovereigns of which they were not and could not become full members.[21]

In 1990 Congress responded to Indian tribes' concerns about the holding in *Duro* by amending[22] the Indian Civil Rights Act[23] to say that the "powers of self-government" of Indian tribes "means the inherent power of Indian tribes,

---

[13] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[14] *Oliphant*, 435 U.S. at 211; *see also United States v. Kagama*, 118 U.S. 375, 379 (1886).

[15] *Oliphant*, 435 U.S. at 212.

[16] *United States v. Wheeler*, 435 U.S. 313 (1978).

[17] *Id.* at 323, 326-29.

[18] *Duro v. Reina*, 495 U.S. 676 (1990).

[19] *Id.* at 679.

[20] *See* Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b).

[21] *Duro*, 495 U.S. at 692-93.

[22] *See* Pub. L. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1892 (1990).

[23] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303.

hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[24] "All Indians" plainly includes Indians who are not enrolled members of the particular tribe exercising jurisdiction. It is significant for the equal protection discussion below, however, that the 1990 Amendments do not cover all persons who may be ethnically Indian. In addition to extending tribal criminal jurisdiction to "all" Indians, the 1990 Amendments make it plain that the definition of "Indian" is the same as "Indian" in the Major Crimes Act.[25]

The 1990 Amendments define "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies."[26] The statute referred to, 18 U.S.C. § 1153 (the Major Crimes Act), says it applies to "[a]ny Indian."[27] In *United States v. Antelope*,[28] enrolled Indians prosecuted under the Major Crimes Act argued that they were denied equal protection of the laws, because, had they not been Indians, they would have been prosecuted under more favorable state law. The Court described the federal scheme as one in which "[e]xcept for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts." The Court rejected the Equal Protection challenge because "respondents were not subjected to

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[24] 25 U.S.C. § 1301(2).

[25] 18 U.S.C. § 1153.

[26] 25 U.S.C. § 1301(4).

[27] *See* 18 U.S.C. § 1153(a).

[28] *United States v. Antelope*, 430 U.S. 641 (1977).

federal criminal jurisdiction because they were of the Indian race but because they were enrolled members of the Coeur d'Alene Tribe."[29] The Court pointed out that "federal jurisdiction under the Major Crimes Act does not apply to 'many individuals who are racially to be classified as "Indians."'"[30] The Court noted in dictum that lower courts had held that enrollment was not an "absolute" requirement for federal jurisdiction in some circumstances, but because respondents were enrolled, the Court was "not called upon to decide" whether enrollment was an absolute requirement and "therefore intimate[d] no views on the matter."[31]

Taken together, the 1990 Amendments, the Major Crimes Act, and *Antelope* mean that the criminal jurisdiction of tribes over "all Indians" recognized by the 1990 Amendments means all of Indian ancestry who are also Indians by political affiliation, not all who are racially Indians. For that reason, subjecting Means to tribal court jurisdiction but not non-Indians, is, as we explain further below, not a racial classification.

Means argues that the 1990 Amendments were outside the powers of Congress because they were an unconstitutional delegation of federal governmental authority and because they went beyond the congressional power authorized under the Indian Commerce[32] and

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[29] *Id.* At 646.

[30] *Id.* at 646 n.7 (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).

[31] *Id.* at 646-47, n. 7.

[32] U.S. Const. art. I, § 8, cl. 3.

Treaty[33] Clauses. Indian tribes are not bound by the United States Constitution in the exercise of their powers, including their judicial powers,[34] so federal judicial power over nonmembers could not be delegated to them.[35]

Following the 1990 Amendments, Means's theory was tested in other cases. Double jeopardy cases examined whether the statutory language, "recogniz[ing] and affirm[ing]" the power of tribes over nonmember Indians rather than "delegating" it, avoided double jeopardy problems when both a tribe and the federal government punished someone for the same conduct. If the tribe was exercising its inherent sovereign authority, an Indian defendant could be punished in both the tribal court as well as in federal district court under the "dual sovereignty" doctrine.[36] If the tribe was exercising delegated federal power, then the federal government would be punishing the Indian twice for the same conduct, which it could not do under the double jeopardy clause.[37] More broadly, after the Supreme Court in *Duro* had concluded that the tribe had not retained sovereign power over nonmember Indians,[38] the question was whether Congress even had the ability to "recognize" an inherent power.[39]

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[33] U.S. Const. art. II, § 2, cl. 2.

[34] *See Talton v. Mayes*, 163 U.S. 376, 382-85 (1896).

[35] *See Duro*, 495 U.S. at 686.

[36] *See, e.g., United States v. Lara*, 324 F.3d 635, 636 (8th Cir. 2003) (en banc), *rev'd*, 541 U.S. 193 (2004); *United States v. Enas*, 255 F.3d 662, 675 (9th Cir. 2001) (en banc).

[37] *See Enas*, 255 F.3d at 667.

[38] *See Duro*, 495 U.S. at 679.

[39] *See Enas*, 255 F.3d at 667-75.

These questions raised by Means's statutory argument[40] have, subsequent to the original briefing in this case, been definitively answered by the Supreme Court. *United States v. Lara*[41] holds that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do."[42] As for whether the tribe's exercise of criminal jurisdiction was a delegated power or an inherent sovereign power, the Court held, with certain reservations, that "the Constitution permits tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."[43] Thus, except for the questions reserved in *Lara*,[44] it is settled law that, pursuant to the 1990 amendment to the Indian Civil Rights Act, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe's reservation.

III. Equal Protection and Due Process

A. Equal Protection

Lara expressly declined to answer the question of whether the tribal criminal prosecution of a nonmember Indian would violate the Due Process and Equal Protection

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[40] *Cf. Enas*, 255 F.3d at 665; *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941, 942 (9th Cir. 1998), *overruled in part*, *Enas*, 255 F.3d at 675 n.8.

[41] *United States v. Lara*, 541 U.S. 193 (2004).

[42] *Id.* at 200.

[43] *Id.* at 210.

[44] *See id.* at 207-09 (declining to address equal protection and due process challenges to the Indian Civil Rights Act).

guarantees of the Fifth Amendment.[45] Means argues that by recognizing tribal criminal jurisdiction over nonmember Indians, the 1990 Amendments violate the equal protection guarantees of the Fifth Amendment[46] and the Indian Civil Rights Act[47] because they discriminate against him as an Indian, subjecting him to adverse treatment on account of his race.

Means's equal protection argument has real force. He argues that, although the 1990 Amendments permit the Navajo tribe to criminally prosecute its own members and members of other Indian tribes, the Navajo tribe cannot constitutionally prosecute whites, blacks, Asians, or any other non-Navajos who are accused of crimes on the reservation.[48] This makes Means's case different from, say, an Alaskan who threatens and batters his father-in-law in Los Angeles, and then is prosecuted by the State of California. Not only can an Alaskan become a Californian, but the State of California, although "sovereign," nonetheless is bound by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although he is an Indian, Means is nonetheless a citizen of the United States, entitled to the full protection of the United States Constitution. But unlike states, when Indian tribes exercise their sovereign authority they do not have to comply with the United States Constitution.[49] As an Oglala-Sioux, Means can

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[45] *See id.* at 208-09; *see also id.* at 213-14 (Kennedy, J., concurring).

[46] *See* U.S. Const. amend. V.

[47] *See* 25 U.S.C. § 1302(8).

[48] *See Oliphant*, 435 U.S. at 194.

[49] *See Talton*, 163 U.S. at 382-85; *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476-77 (9th Cir. 1980). Although the Indian Civil Rights Act imposes due process limitations upon Indian tribes, 25 U.S.C. § 1302(8), not all the constitutional restraints are

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never become a member of the Navajo political community, no matter how long he makes the Navajo reservation his home.

Despite the force of Means's argument, we nonetheless conclude that the weight of established law requires us to reject Means's equal protection claim. *Morton v. Mancari*[50] holds (albeit in the distinguishable context of Indian employment preferences by the federal government) that federal statutory recognition of Indian status is "political rather than racial in nature."[51] Means argues that *Mancari* is undermined by *Adarand Constructors, Inc. v. Pena*,[52] but both the Supreme Court and our court have continued to rely on *Mancari*,[53] and we are bound to follow it under the doctrine of *Agostini v. Felton*.[54]

Mancari held that an employment preference for Indians in the Bureau of Indian Affairs was not "invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment"[55] because "it is not even a

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imposed. They are statutory, not constitutional, and the sole remedy for violations is habeas corpus. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978).

[50] *Morton v. Mancari*, 417 U.S. 535 (1974).

[51] *Id.* at 553 n.24.

[52] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 1147-48 (2005).

[53] *See Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004).

[54] *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

[55] *Mancari*, 417 U.S. at 551.

'racial' preference."[56] "[L]egislation that singles out Indians for particular and special treatment" is in a special category because of the historical relationship of the United States with the Indians and the Indian Commerce Clause,[57] and "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[58] The preference at issue passed this "rational tie" standard, because it was "reasonable and rationally designed to further Indian self-government."[59]

We conclude that a law subjecting nonmember Indians to tribal criminal jurisdiction in "Indian country" passes the "rational tie" standard of *Mancari*. First, recognizing criminal jurisdiction of tribal courts over nonmember Indians furthers Indian self-government. The Navajo reservation, larger than many states and countries, has to be able to maintain order within its boundaries. The 1990 Amendments to the Indian Civil Rights Act were meant to protect Indians and others who reside in or visit Indian country against lawlessness by nonmember Indians who might not otherwise be subject to any criminal jurisdiction. As the Navajo Supreme Court notes, there are a significant number of Indians who are not Navajos but live on the Navajo reservation because of intermarriage. It is a matter of ordinary experience that many people are not at their best when their marriages break up, so misdemeanor jurisdiction over nonmember Indians is rationally related to Indian self-government in an area where

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[56] *Id.* at 553.

[57] *See id.* at 551-55.

[58] *Id.* at 555.

[59] *Id.*

rapid and effective tribal responses may be needed. The Navajo Nation has a sophisticated body of published laws, and an experienced court system in which trained trial and appellate judges adjudicate thousands of cases per year. If Means was not subject to prosecution in the Navajo courts, he could not be prosecuted in any court. The state of Arizona, like the majority of states, does not have jurisdiction to try Indians for offenses committed on a reservation,[60] and there is no federal court jurisdiction because Means's alleged offenses do not fall within the Major Crimes Act.[61]

Second, the reason Congress can recognize the power of a tribe to exercise criminal jurisdiction over a nonmember Indian like Means – but not over a nonmember, non-Indian who like Means might become involved in a domestic dispute – is the same reason given by the Supreme Court for the employment preference in *Mancari*: Indian tribal identity is political rather than racial, and the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians.

In *United States v. Antelope*, Indians who were enrolled members of the Coeur d'Alene Tribe challenged the applicability of federal law to a prosecution for a murder that had taken place on the tribe's reservation.[62] Had they been of a different race, they argued, a more favorable provision of state law would have applied under the

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[60] *See, e.g., Application of Denetclaw*, 320 P.2d 697, 698-701 (1958).

[61] *See* 18 U.S.C. § 1153.

[62] *Antelope*, 430 U.S. at 642-44.

Assimilative Crimes Act,[63] rather than the less favorable federal provision that applied under the Major Crimes Act.[64] But the Supreme Court noted its holding in *Mancari* that the employment preference was granted to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign political entities,"[65] and extended *Mancari* even though the context did not involve Indian self-government. The Court found that the respondents were subjected to federal law "not because they are of the Indian race but because they are enrolled members of the Coeur d'Alene tribe."[66]

There is no sound distinction in principle between *Antelope* and this case. The statute subjects Means to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe.[67] We need not decide whether the same principle would apply if he had been expelled from or had voluntarily and formally withdrawn from his tribe[68]

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[63] 18 U.S.C. § 13; *see United States v. McBratney*, 104 U.S. 621, 621-24 (1881).

[64] 18 U.S.C. § 1153.

[65] *Antelope*, 430 U.S. at 645 (quoting *Mancari*, 417 U.S. at 554).

[66] *Antelope*, 430 U.S. at 646.

[67] 25 U.S.C. § 1301(2); *see Antelope*, 430 U.S. at 646.

[68] The authorities suggest that members of Indian tribes can renounce their membership. *See Felix S. Cohen's Handbook of Federal Indian Law* 22 (1982 ed.) ("Tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. A member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses, although such termination will not lightly be inferred."); *see, e.g., Smith v. Bonifer*, 154 F. 883, 886 (C.C.D. Or. 1907) (No. 2,683), *aff'd*, 116 F. 846 (9th Cir. 1909); *United States ex rel. Standing Bear v.*

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prior to committing the alleged misdemeanors because those hypothetical facts are not claimed in this case. *Morton v. Mancari* suggests that Indians "emancipated from tribal relations" or whose tribes have been terminated are not subject to the Major Crimes Act even if they are "racially to be classified as 'Indians.'"[69]

Our court is among the lower courts that have gone where the Supreme Court did not in *Antelope*, holding that formal enrollment in a tribe is not an "absolute" requirement for Indian status even though it is the "common evidentiary means of establishing Indian status."[70] *United States v. Bruce*[71] was a federal prosecution under 25 U.S.C. § 1152 (the Indian General Crimes Act) for assault on a child on an Indian reservation. The defendant in *Bruce* argued that she was an Indian, so she was entitled to the benefit of the exception in that statute for crimes committed by an Indian against an Indian. She was not enrolled in any tribe nor was she eligible for enrollment. We held (over a strong dissent) that she was nevertheless entitled to the benefit of the Indian exception because her mother's enrollment, two of her three children's enrollment, and other evidence of affiliation with the tribe demonstrated "'a sufficient non-racial link to a formerly sovereign people'"[72] to make her an "Indian" for purposes of the exception.

Crook, 25 F. Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891); *Thompson v. County of Franklin* 180 F.R.D. 216, 225 (N.D.N.Y. 1998).

[69] *Morton*, 430 U.S. at 646-47, n. 7.

[70] *United States v. Bruce*, 394 F.3d 1215, 1224. (9th Cir.2005).

[71] *Id.*

[72] *Id.* at 1224 (quoting *St. Cloud v. United States*, 702 F.Supp. 1456, 1461 (D.S.D. 1988)).

Means's case is distinguishable from *Bruce*, most especially by his tribal enrollment. We therefore can and do leave for another day the challenging question *Bruce* invites: whether a person who was racially Indian, but who was not enrolled or eligible for enrollment in any tribe, would be subject to tribal court jurisdiction. While *Bruce* was a federal prosecution which would have implicitly limited tribal sovereignty if the Indian exception did not apply, this case is a tribal court prosecution. Means has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial. *Bruce* concluded, as we do, that "Tribal courts may . . . prosecute misdemeanors against Indians who are not members of that tribe."[73]

B. Due Process

Because the criminal proceedings against Means in the Navajo trial court have been stayed pending the outcome of his jurisdictional challenge, an "as applied" due process challenge to the Navajo trial proceedings would be premature.[74] Means's facial due process challenge to the 1990 Amendments has no force. Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers,[75] the Indian Civil Rights Act confers all the criminal protections on Means that he would receive under the Federal Constitution, except for the right to grand jury indictment and the right to appointed

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[73] *Id.* at 1220.

[74] *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

[75] *See Talton*, 163 U.S. at 382-85.

counsel if he cannot afford an attorney.[76] The right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor.[77] The right to appointed counsel is conferred by the Navajo Bill of Rights to any person within its jurisdiction.[78] Thus as a facial matter, Means will not be deprived of any constitutionally protected rights despite being tried by a sovereign not bound by the Constitution.

IV. The Treaty of 1868

The war between the United States and the Navajo Nation, which began in the middle of the U.S. Civil War, ended in 1868 with a treaty[79] signed on behalf of the United States by General William Tecumseh Sherman. Means argues that, under the terms of this treaty, he may not be criminally prosecuted by the Navajo tribe but must be turned over to the federal government for trial.

Means bases his argument on the so-called "bad men" clauses of the 1868 Treaty. Indian tribes warred, not only with the federal government, but also with other tribes. Guaranteeing that the Indians would return to a peaceful way of life, therefore, required some means of dealing with the hostile foreign tribes.

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[76] *See* 25 U.S.C. § 1302; *Santa Clara Pueblo*, 436 U.S. at 61; *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988).

[77] *See* U.S. Const. amend. V; *cf.* Fed. R. Crim. P. 7(a)(2).

[78] *See* Navajo Nation Code tit. 1.

[79] Treaty between the United States of America and the Navajo Tribe of Indians, June 1, 1868, U.S.-Navajo, 15 Stat. 667.

One clause in the 1868 Navajo Treaty – which is identical to language used in a number of Indian Treaties of the time – says that

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States.[80]

A second clause, speaking expressly about Indians, is analogous:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws.[81]

Means argues that even if the Navajo Nation at one time possessed the sovereign power to assert criminal jurisdiction over nonmember Indians, it relinquished that right by entering into the 1868 Treaty, which requires that the Navajo Tribe deliver the wrongdoer to the United States, to be tried and punished according to federal, not Indian, law. Means also argues that the 1990 Amendments

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[80] *Id.*

[81] *Id.*

to the Indian Civil Rights Act cannot abrogate the protections to which he is entitled under the 1868 Treaty because Congress has never expressly abrogated the treaty.

The Navajo Nation, however, argues that a discussion between General Sherman and the Navajo Chief Barboncito during the treaty negotiations expresses an understanding that the Navajo were entitled to "drive out" raiders from the Ute and Apache tribes who might molest them, and that the Indian "bad men" clause therefore meant to confer jurisdiction over nonmember Indians, not to remove it. The Navajo Nation also suggests that we are bound to defer to the understanding of the treaty expressed well over a century after its adoption by the Navajo Nation Supreme Court. That court found that the 1868 Treaty provides for criminal jurisdiction over Means because he entered the Navajo Nation, married a Navajo woman, and engaged in business and civic activities while residing on the reservation.

We accept neither argument because the 1868 Treaty does not conflict with, and is easily reconciled with, the language of the 1990 Amendments to the Indian Civil Rights Act that recognizes the inherent sovereign power of the tribe. A common sense understanding of the treaty language would be that the United States was obligating itself to protect the Navajos from "bad men," of whom the world is never short, and the Navajos were obligating themselves to turn the "bad men" over to the United States when appropriate under the specified conditions.[82] The treaty obligates the United States to arrest and

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[82] *Cf. Tsosie v. United States*, 825 F.2d 393, 400-02 (Fed. Cir. 1987); *Hebah v. United States*, 428 F.2d 1334, 1338-40 (1970).

punish offenders against the Navajo, under federal law, but it does not say that the Navajo cannot do so on their own, and there is nothing in the treaty language inconsistent with the concurrent jurisdiction that we have recognized in other contexts.[83]

The remedies provided for by the 1868 treaty do not purport to be exclusive. Under the treaty, Indian offenders are to be delivered to the United States for prosecution under federal law on request. This provision, however, is conditioned on a request from the United States's agent. The treaty conditions have not been fulfilled in this case, so the rendition provision in the treaty does not apply. The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do.

Conclusion

The Navajo Nation is empowered, under the 1990 Amendments, to prosecute and punish Indians for crimes even though they are not members of the tribe. The denial of Means's petition for a writ of habeas corpus is

AFFIRMED.

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[83] *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 595-98 (9th Cir. 1983); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685-86 (9th Cir. 1969); *see also Williams v. Lee*, 358 U.S. 217, 221-22 (1959).